# TRANSCRIPT OF RECORD

## Supreme Court of the United States

OCTOBER TERM, 1955

## No. 489

DAN DURLEY, PETITIONER,

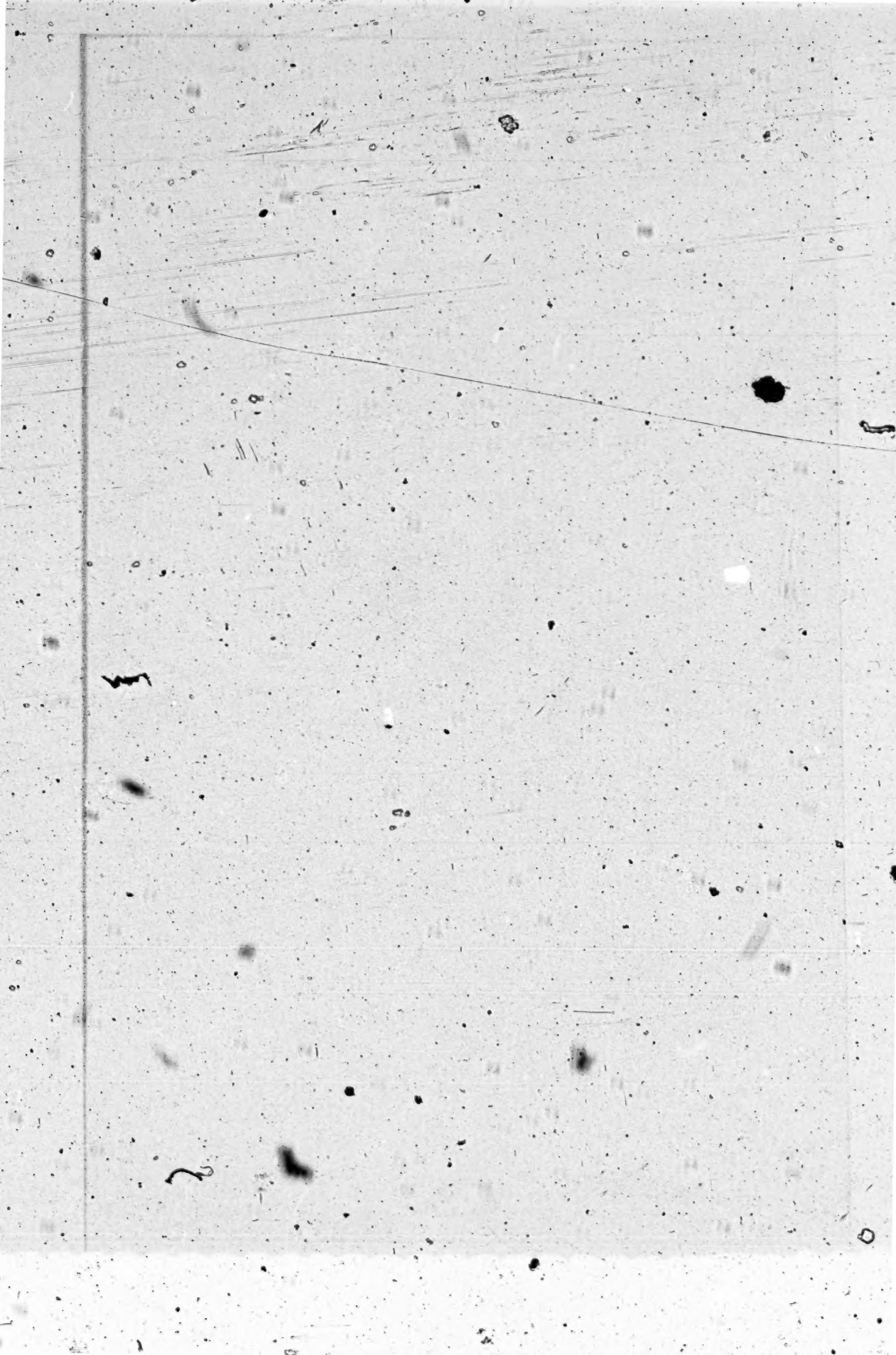
*vs.*

NATHAN MAYO, CUSTODIAN, FLORIDA STATE PRISON

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA

PETITION FOR CERTIORARI FILED APRIL 18, 1955

CERTIORARI GRANTED OCTOBER 24, 1955



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# IN THE SUPREME COURT, STATE OF FLORIDA, JANUARY TERM, A. D. 1955

DAN DURLEY, Petitioner,

vs.

NATHAN MAYO, Prison Custodian, Respondent

PETITION FOR WRIT OF HABEAS CORPUS—Filed February 10, 1955

To the Court:

Comes now the Petitioner, Dan Durley, in proper person and represents unto this Honorable Court as follow:

He is unlawfully imprisoned and restrained of his liberty by the aforesaid custodian, Nathan Mayo, at the Florida State Prison, Raiford, Florida.

Petitioner's detention and imprisonment is without basis in law or fact, violates his rights under the laws and Constitution of the State of Florida, and is an abuse of the Due Process Clause of the 14th Amendment to the Constitution of the United States of America.

Respondent's sole color of authority he deprives the Petitioner of his liberty is found in a void and unlawful judgment and sentence entered against petitioner by the Criminal Court of Record in and for Polk County, Florida, on the date of October, 19th, 1945, pursuant to an illegal conviction for the offense of Cattle Stealing.

There are attached hereto and made a part hereof, styled by exhibit letters as indicated below, the following documents, all of which has been certified as true and correct by the Clerk of Court, Criminal Court of Record, for Polk County, Florida.

Exhibit "A" a document which purport- to be an information, #4172., charging stealing cattle on the 7th day of July, 1945, five head of cattle.

Exhibit "B" a document which purports to be an information, #4179., charging stealing three head of cattle on the date of July 29th, 1945.

Exhibit "C" a document which purports to be three

judgments under information #4172. bearing date of October 19, 1945.

[fol. 3] Exhibit "D" a document which purport- to be three judgments under information #4179, bearing date of October 19th., 1945.

Petitioner hereinafter sets forth facts, laws and circumstances upon which he relies in support of this petition, and identifies each under the following numerical sections:

Section I. The document (Exhibit "A") which purport- to be a criminal information, is neither a sufficient nor a lawful basis upon which to invoke a trial prosecution, as shown by the reasons hereinafter set forth.

Section 2. The document (Exhibit "C") which purports to be three judgments and sentences under information #4172, is null and void for the reasons hereinafter set forth.

Section 3. The document (Exhibit "B") which purport- to be an information, #4179 is neither a sufficient nor a lawful basis upon which to invoke a trial prosecution, as shown by the reasons hereinafter set forth.

Section 4. The document (Exhibit "D") which purports to be three judgments and sentences under information, information #4179, is null and void for the reasons hereinafter set forth.

## Section I

The Document (Exhibit "A") is neither a sufficient now a lawful basis for prosecution thereunder for the following reasons:

1. The property stolen (cattle) are not described as required by law. It neither give- color, description, ear marks nor brand, wherein the cattle could be identified as belonging to the alleged owner.

2. The information dividing the cattle into three separate counts is placing the defendant, Petitioner in to double and triple jeopardy, for one single alleged act.

The said information, allege- that Dan Durley, et al., feloniously stole two steers (description unknown) the property of Mrs. Edna P. Bronson on the 7th day, of July, 1945.

Second Count allege- that Dan Durley et al., did steal and

carry away two cows (description unknown) the property of Mrs. Edna P. Bronson, on the 7th, day of July, 1945.

Third Count allege, that Dan Durley et al., did steal and carry away one heifer (description unknown) the property of Mrs. Edna P. Bronson, on the 7th, day of July, 1945.

The record reveal- that it was only one act. The cattle [fol. 4] were all on the same range, rounded up, killed and butchered at the same time, hauled off on the same truck, at the same time and sold at the same time and was all done under one contineous act.

2. Section 1, (exhibit "A") alleged that five head of cattle was taken and carried away on the date of July 7th, 1945. Information is entitled, "Cattle Stealing." and is dividing the cattle in to seperate counts erroneously put the defendants under double jeopardy.

Section 3

The document (Exhibit "B") is neither a sufficient nor lawful basis for prosecution thereunder, for the following reasons:

1. The property stolen (cattle) are not described as required ~~by law.~~ It neither give- color; description, ear marks nor brands, wherein the cattle can be identified as required by law, wherein they could be identified as to the lawful owner.

2. The information in dividing the cattle into three seperate counts is placing the defendant, "petitioner," under double jeopardy, for one single alleged act.

3. The said information alle*d*ge that Dan Durley et al. did steal, take and carry away one cow and two heifers on the 29th, day of July 1945 description unknown, the property of William C. Zipperer. Erroneously attempt*ion* to make three separate and distinct acts, when the charge itself show- it was only one act, and intent.

Count one charge- that Dan Durley et al. did take, steal and carry away one cow on the 29th day of July, 1945. Count two, charge- that Dan Durley et al. did take and carry away one heifer on the 29th, day of July 1945. Count three (identical duplicate of count two) charge- that Dan Durley et al. did take steal and carry away one heifer on

the 29th, day of July 1945. The information show that the three cattle were taken on the same date; rounded up on the same range, killed, butchered and delivered to the same market the same day and was one contineous act and intent. A trial under either count was a bar to further prosecution and by so doing placed the defendant, petitioner, under double jeopardy.

Section 4

Count four a Document (Exhibit "D") purports to be three judgments and sentences, pursuant to trial and conviction under information, #4179 (Exhibit "B").

[fol. 5] Wherein the Court adjudged the petitioner to be guilty of all three counts charged within the information and pronounced sentence as follows: Five years on the first count; Second count, sentenced to five years to begin to run at the expiration of the five year sentence, pronounced in first count; Third count sentenced to five years, sentence to begin at the expiration of sentence pronounced in second count. Making a total of fifteen (15) years.

A trial on either count, was a bar to further prosecution and in violation of the Constitution of the State of Florida, Declaration of Rights Section 12 and violates the spirit of the Constitution of the United States of America. The information under which this prosecution was had, show that the larceny of the three cattle were one act and intent and under the same circumstances. The record reveal by the two co-defendants' testimony that the three cattle were all on the same range, rounded up and killed at the same time and place, butchered and carried to the same market on the same truck and show it was one contineous act.

In support of this contention is hereto attached and made a part hereof as Exhibit "E" to affidavits executed by two reliable and disenterested citizens. And, relying upon the Hearn et al. vs. State, Fla., 55 So.2d, 559 where this Court said inter alia:

Head Note #—. Quote:

"Where defendants took nine cows and two calves belonging to different owners, at same time, from same place and under same circumstances with same intent,

the offense was a single larceny and conviction for larceny of one cow, property of one of the owners, were a bar on grounds of former jeopardy to prosecution for larceny of the remaining cattle.

This case seem- to be parallel and on all fours with the above cited case, supra. The only difference in the two cases, in the Hearn case the cattle belonged to different owners, and in the case at bar the three cattle were the property of one owner. But taken at the same time and under the same circumstances and intent and one act.

There can be no controversity on this question, as this Court has *analogous* ruled where several articles are taken, at the same time and under the same circumstances with one intent and one continuous act it is only one larceny and one offense. Wherefore two of the judgments and five (5) year sentences are null and void and of no effect. And, under information #4179 could only carried one five (5) year sentence.

[Tol. 6] Section 2

A document (Exhibit "C") which purports to be three separate judgments and sentences, pursuant to conviction under information # 4172, (Exhibit "A") imposed October 19th, 1945. Five (5) year sentence under count one of information # 4172 to begin at the expiration of former five (5) sentence imposed under count three of information # 4179. (Exhibit "B"). Sentence to five (5) years under count two of information # 4172 to begin to run at the expiration of sentence under count one.

Sentenced to five (5) years on count three of said information, to begin at the expiration of count two of said information.

These three five (5) year sentences to run consecutive-making a total of fifteen (15) years, running consecutively with the three five (5) year sentences imposed under the three counts of information 4179, making a grand total of thirty (30) years. The excessive sentences were all imposed on October 19th, 1945.

There can be no contraversity in that two of the five year sentences imposed pursuant to conviction of cattle stealing

on July 7th, 1945 are null and void and of no effect as the two five (5) year sentences imposed pursuant to conviction of cattle stealing under information # 4179, are null and void. The maximum sentences that could have been lawfully imposed would have been five (5) years under both informations, making a total of ten (10) years, and the two five year sentences running consecutively and as one ten (10) year sentence in accordance with Chapter 954.06, Fla. Statute, 1941, the ten year sentence expired November 8th, 1951. And, the petitioner is being illegally deprived of his liberty and held in prison in violation of his Constitutional Rights both State and Federal, supra, and, without any authority of law whatsoever.

The record reveals that cattle taken on the date of July 7th, 1945 were all on the same range, rounded up and killed at the same time butchered and carried to the market at the same time, on the same truck, and sold to the same market, and was one continuous act with one intent. And that the petitioner has twice been placed under jeopardy for the same act. See affidavit (Exhibit "E" supra.)

Petitioner calles the Court's attention to the fact that he is [fol. 7] not guilty of the alleged offense and knew nothing about such an offense being committed whatsoever, and hereby attaches affidavits sworn to by the co-defendants as true and made a part hereof as exhibit ("F").

This letter of affidavit is self explanatory, giving his reasons as to why he implicated the petition. QUOTE, " . . . hoping that it would aid me when my case came up." He also states under oath that any testimony given by himself hereto-fore (at the trial) that had any weight in convicting Dan Durley for stealing cows in Polk County, was a falsehood.

He further states under oath in said affidavit, QUOTE: "Dan Durley never knew of any cattle dealings on our part and never received a dime for any cows stolen by us."

Another affidavit is hereto attached and made a part hereof as (Exhibit "C".) executed by J. E. Croft.

Charles Bath a co-defendant entered a plea of guilty to both informations who also implicated the petitioner hoping that the Court would be lenient by so doing.

After the conviction and the three defendants were ac-

cordingly sentenced and delivered to the prison, and waiting for such identifications necessary before being consigned to work, prisoners discussing their cases with each other, this affidavit is based upon the statement made by Charles Bath direct to the affiant Croft. The statement made by Bath corresponds with the affidavit executed by co-defendant, R. B. Massy, Jr.

There *were* no other testimony offered at the trial which would connect the petitioner directly, or indirectly, except the testimonys given by R. B. Massey, Jr., and Charles Bath who had both entered a plea of guilt- to both informations. Here by affidavits they both refute their statements made by them at the trial and declare the innocence of the petitioner.

Hereto attached is an affidavit executed by L. L. Bembry (Exhibit "H") and made a part hereof, showing the whereabouts of the petitioner at the time and on the date of the alleged offense, July 7th, 1945, which establish- the fact that petitioner did not have; and could not have *of* had any part in stealing cattle on the 7th day of July 1945, and had no connection with the co-defendants and knew nothing about their whereabouts or actions.

The three affidavits marked exhibits "F", "G" and "H" plainly show that the petitioner was convicted on perjured testimony, and without the testimonies, which have here [fol. 8] been refuted by the same witnesses, there *were* no testimony offered which would implicate the petitioner, directly or indirectly. There the judgments and sentences were predicated entirely and solely upon perjured testimony. There *were* no evidence excluding the refuted testimony whereby a jury could draw an inference nor invoke the judgment. And under such circumstances it is the duty and the Court must make some judicial process for relief.

See: Jones v. Commonwe-lth of Kentucky, 97 F. 2d 335. Head note:

> Quote: "The requirements of due process can not be satisfied by mere notice and hearing if the State has contrived a conviction through the pretence of a trial which in truth is a means of depriving defendant of liberty known to be perjured. Const. Amended."
>
> "Where falsity of perjured testimony upon which

conviction was obtained is discovered after the conviction, as well as where the testimony was known to be perjured when presented, the State must afford corrective judicial process. Const. Amended 14."

This case comes directly under the purvue of the last paragraph quoted above, being head note No. 6 of the opinion cited. The only witnesses that gave testimony in the two cases here involved, have made sworn to affidavits refuting all testimony which was incriminating to the petitioner. And, declaring the innocence of petitioner. Discarding the testimonys of the two co-defendants, leaves a blank in regards to the petitioner's name. "Dan Durley."

The petitioner *have* now placed the facts and circumstances before this Honorable Court, whereby the court can make the proper judicial process. The petitioner has brought to the attention of this Honorable Court, facts, circumstances and law, showing that there were only two charges upon which petitioner was prosecuted and convicted, that is prosecuted and convicted under information # 4172 charging stealing cattle on July 7th, 1945, the maximum sentence five (5) years, and tried and convicted under information # 4179, charging stealing cattle on the 29th day of July, 1945, the maximum sentence five (5) years, which with gain time allowed under Chapter 954.06 Fla. Statute 1941, expired October 20th 1949. Since that time petitioner has been held in prison deprived of his liberty, by the aforesaid custodian, Nathan Mayo, in violation of his Constitutional Rights afforded him by the State of Florida and the [fol. 9] Constitution of the United States of America.

Wherefore, premises considered, petitioner prays this Honorable Court, that a writ of habeas corpus issue, directed to the aforesaid Custodian, Nathan Mayo, that on a day certain that he have the pefitioner before this Honorable Court, and there to show lawful cause for further detention, and for other and further relief that the Court may deem right and just, and so will forever pray.

Respectfully submitted, (S.) Dan Durley, Petitioner,
Box 221, Raiford, Fla.

*Duly sworn to by Dan Durley. Jurat omitted in printing.*

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[fol. 10] EXHIBIT "A" TO PETITION

In the Criminal Court of Record, of the County of Polk and State of Florida, in the year of our Lord one thousand nine hundred and forty-five.

STATE OF FLORIDA

vs.

DAN DURLEY, E. B. MASSEY, JR., CHARLES BATH

Information for Stealing Cattle.

In the name and by authority of the State of Florida.

Gunter Stephenson, County Solicitor for the County of Polk, prosecuting for the State of Florida in the said County, under oath, information makes that Dan Durley, R. B. Massey, Jr., and Charles Bath of the County of Polk and State of Florida, on the 7th day of July in the year of our Lord, one thousand nine hundred and forty-five in the County and State aforesaid, did unlawfully and feloniously steal, take and carry away two steers, a more particular description of which is to the County Solicitor unknown, of the goods, chattels and property of Mrs. Edna P. Bronson, contrary to the form of the Statute in such case made and provided and against the peace and dignity of the State of Florida.

Second Count: Gunter Stephenson, County Solicitor for the County of Polk, prosecuting for the State of Florida in the said County, under oath, further charges that Dan Durley, R. B. Massey, Jr., and Charles Bath, of the County of Polk and State of Florida, on the 7th day of July, 1945, in the County and State aforesaid, did unlawfully and feloniously steal, take and carry away two cows, a more particular description of which is to the County Solicitor unknown, of the goods, chattels, and property of Mrs. Edna P. Bronson, contrary to the form of the Statute in such case made and provided and against the peace and dignity of the State of Florida.

Third Count: Gunter Stephenson, County Solicitor for the County of Polk, prosecuting for the State of Florida, in the said County, under oath, further charges that Dan Durley, R. B. Massey, Jr., and Charles Bath, of the County of Polk and State of Florida, on the 7th day of July, 1945, in the County and State aforesaid, did unlawfully and feloniously steal, take and carry away one heifer, a more particular description of which is to the County Solicitor unknown, of the goods, chattels and property of Mrs. Edna P. Bronson. Contrary to the form of the Statute in such case made and provided, and against the peace and dignity of the State of Florida.

Gunter Stephenson, County Solicitor, Polk County, Florida.

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[fol. 11] EXHIBIT "B" TO PETITION

In the Criminal Court of Record, of the County of Polk and State of Florida, in the year of our Lord one thousand nine hundred and forty-five.

STATE OF FLORIDA

vs.

DAN DURLEY, R. B. MASSEY, JR., CHARLES BATH

Information for Stealing Cattle

In the name and by authority of the State of Florida,

Gunter Stephenson, County Solicitor for the County of Polk, prosecuting for the State of Florida in the said County, under oath, information makes that Dan Durley, R. B. Massey, Jr., and Charles Bath; of the County of Polk and State of Florida, on the 29th day of July in the year of our Lord, one thousand nine hundred and forty-five in the County and State aforesaid, did unlawfully and feloniously steal, take and carry away one cow, a more particular description of which is to the County Solicitor unknown, of the goods, chattels and property of William C. Zipperer, contrary to the form of the Statute in such case made and provided and against the peace and dignity of the State of Florida.

Second Count: Gunter Stephenson, County Solicitor for the County of Polk, prosecuting for the State of Florida in the said County, under oath, further charges that Dan Durley, R. B. Massey, Jr., and Charles Bath, of the County of Polk and State of Florida, on the 29th day of July, 1945 in the County and State aforesaid, did unlawfully and feloniously steal, take and carry away one heifer, a more particular description of which is to the County Solicitor unknown, of the goods, chattels and property of William C. Zipperer, contrary to the form of the Statute in such case made and provided and against the peace and dignity of the State of Florida.

Third Count: Gunter Stephenson, County Solicitor for the County of Polk, prosecuting for the State of Florida, in the said County, under oath, further charges that Dan Durley, R. B. Massey, Jr., and Charles Bath, of the County of Polk and State of Florida, on the 29th day of July, 1945, in the county and state aforesaid, did unlawfully and feloniously steal, take and carry away one heifer, a more particular description of which is—the County Solicitor unknown, of the goods, chattels and property of William C. Zipperer, contrary to the form of the Statute in such case made and provided, and against the peace and dignity of the State of Florida.

Gunter Stephenson, County Solicitor, Polk County, Florida.

[fol. 12] EXHIBIT "C" TO PETITION

IN THE CRIMINAL COURT OF RECORD IN AND FOR POLK COUNTY, FLORIDA

Exhibit "C"

No. 4172

STATE OF FLORIDA

vs.

DAN DURLEY, L. B. MASSEY, JR., CHARLES BATH

Stealing Cattle

Comes now the Defendant, Dan Durley, pursuant to the entry of the verdict of the jury and stands before the Court for sentences to be pronounced upon him, and having been asked by the Court if he had anything to say why the sentence of the law should not be passed upon him, offers nothing in bar thereto.

Therefore, the Court now adjudges you, Dan Durley, to be guilty of the crime of Stealing Cattle as charged in each count of the Information in this cause, for which you stand convicted by the jury, and it is the sentence of the law and the judgment of the Court, that you, Dan Durley, for your said offence charged in the First Count of the Information, be confined in the State Prison of Florida at hard labor for a term of Five (5) years, to begin at the expiration of the sentence pronounced upon you for the offense charged in the Third Count of the Information in Case No. 4179; it is the sentence of the law and the judgment of the Court that you, Dan Durley, for the offense charged in the Second Count of the Information in this cause, be confined in the State Prison of Florida at hard labor for a term of Five (5) years to begin at the expiration of the sentence imposed upon you for the offense charged in the first count of the Information in this cause; and it is the sentence of the law and the judgment of the Court that you, Dan Durley, for the offense charged in the Third Count of the Information in this cause, be confined in the State Prison of Florida at hard labor for a term of Five (5) years to begin at the expiration of the

sentence imposed upon you for the offense charged in the Second Count of the Information in this cause, this sentence to run consecutive with sentence in Case No. 4179.

This Oct. 19, A. D. 1945.

R. H. Amidon, Judge.

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[fol. 13] EXHIBIT "D" TO PETITION

IN THE CRIMINAL COURT OF RECORD IN AND FOR POLK COUNTY, FLORIDA

No. 4179

STATE OF FLORIDA

vs.

DAN DURLEY, R. B. MASSEY, JR., AND CHARLES BATH

(Exhibit "D")

Stealing Cattle

The Defendant, Dan Durley, having been duly convicted and adjudged guilty by the Court of the offense charged in each count of the Information in this cause on Oct. 17, 1945, appears this day with his counsel of record for sentences to be pronounced upon him, and being asked by the Court if he had anything to say why the sentences of the law should not be passed upon him, offers nothing in bar thereto.

Therefore, it is the sentence of the law and the judgment of the Court that you, Dan Durley, for your said offense charged in the First Count of the Information, be confined in the State Prison of Florida at hard labor for a term of Five (5) years; it is the sentence of the law and the judgment of the Court that you, Dan Durley, for your said offense charged in the Second Count of the Information, be confined in the State Prison of Florida at hard labor for a term of Five (5) years to begin at the expiration of the sentence pronounced upon you for the offense charged in the First Count of the Information; and it is the sentence of the law and the judgment of the Court that you, Dan

Durley, for your said offense charged in the Third Count of the Information, be confined in the State Prison of Florida at hard labor for a term of Five (5) years to begin at the expiration of the sentence pronounced upon you for the offense charged in the Second Count of the Information.

This Oct. 19, A. D. 1945.

R. H. Amidon, Judge.

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[fol. 14] EXHIBIT "E" TO PETITION

Date of January 1955

Affidavit

STATE OF FLORIDA,
County of Polk:

Before me an officer duly authorized to administer o-ths. personally appeared, Jack, Rouse, and his wife; beaing affiliated and after being duly sworn, according to law, deposes and saus; that they were both present at and during the trial of Dan Durley, R. B. Massey, Jr. and Charles Bath, in the Criminal Court of Record in and for Polk County, State of Florida. Wherein the State of Florida was the plaintiff and the three above named men were defendants, being charged and tried for cattle stealing on the date of (July, 7th, 1945) the trial of which, was five head of cattle, all of which, was took, at one taking, and I listened to the testimony of the two defendants, R. B. Massey and Charles Bath, each admitted to their gu-lt and stated that they shot down five head of cattle and then skin-ed and dressed them and carried all five of them to the market at the same time and sold them all to one market all five of them at the one sale, and on the date of July 29th, 1945, where they to-k three head of cattle all of them was on the same day and at the same time and sold to the one market on the same day of July 29th, all three was stole at the one time, and sold at one and same time;

I Jack Rouse, and Mrs. Jack Rouse, name of affiant, do hereby certify that we the affiant in the foregoing instru-

ment and we have carefully read it and that is true in substance, to the best of our ability;

(S.) Jack K. Rouse, Affiant, (S.) Duaine A. Rouse, Affiant. (N. S.)

Witness: (S.) Sam L. Lupfer, Notary Public, State of Florida at Large.

Witness: My Commission Expires December 22, 1956.

Witness: 15th Date of January, 1955.

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[fol. 15] EXHIBIT "H" TO PETITION

STATE OF FLORIDA,
County of Polk:

Affidavit of L. L. Bembry

Before the subscriber this day came L. L. Bembry, who upon being duly sworn deposes and says:

That in July 1945 I was employed on a job for J. C. Kincaid in Polk County, Florida and I remember definitely that one Dan Durley worked with me on this job on Monday, July 2, Tuesday, July 3 and on Wednesday, July 4 until 2:00 o'clock P. M. That the said Dan Durley was off from work with me on Wednesday afternoon, July 4, and all of Thursday July 5. He worked with me Friday, July 6 all day and Saturday, July 7 until noon of that day.

I know that the above is true as I recall definitely when he worked and the days he did not.

Censored M. C. W.

[fol. 16] L. L. Bembry.

Sworn to and subscribed before me on this the 14th day of December, 1945. Allie R. Barnes, Notary Public State of Florida at Large. My commission expires February 9, 1948. (Notarial Seal.)

## Exhibit "F" to Petition

### Affidavit of R. B. Massey, Jr.

22 March 1946.

I, Buford Massey, sometimes known as R. B. Massey, Jr., hereby, without offer of any compulsion, agreement to aid me in any way do hereby declare that any statement, testimony that I have heretofore given that had any effect or weight in convicting Dan Durley for stealing cows in Polk County was a falsehood and that I gave such testimony, hoping that it would aid me when my case came up.

I have never used an automobile that belonged to him and that I borrowed his truck on two occasions and I told him I intended to use it for wood hauling and any stealing or butchering of cows by me was done solely by me and Charles Bath, without knowledge or consent of Dan Durley or anyone for him. He is absolutely innocent of any guilt of stealing whatsoever for which he is serving time in the penitentiary and me and my associate Charles Bath are the sole guilty parties. There are some of the charges against Dan Durley that I plead guilty and also accused Dan Durley that even I don't remember, some of the charges. Dan Durley is absolutely innocent.

Dan Durley never knew of any cattle dealing on our part and never received a dime for any cows stole by us.

I butchered five or six cows for Dan Durley but they were butchered, and delivered to reputable meat markets in and around Lake Wales, Fla. The names can be supplied.

Before God is my judge Dan Durley, never had anything to do with any cattle stealing that I testified to at the trial.

Signed freely and voluntarily at the State Prison this [fol. 17] 22 day of March 1946.

Sworn to and subscribed. This statement was made before me on the 22nd day of March, 1946. H. D. Baldwin, Notary Public State of Florida at Large. (Notarial seal)

My commission expires December 11, 1949.
Bonded by American Surety Co.
Witness: H. C. Baldwin.

R. B. Massey, Jr.

Please be it noted that this statement was made absolutely, freely and without a shade of reticence on the Part of Massey. His demeanor was such that tho he might be though he certainly was not afraid of any of the party, with us.

H. C. Baldwin.

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EXHIBIT "G" TO PETITION

AFFIDAVIT OF J. E. CROFT

TO WHOM IT MAY CONCERN:

This is to certify that the undersigned, after first being duly sworn according to law, deposes and says that on or about the 6th day of January 1946 that he had the following conversation with one Charlie Bath, said conversation taking place at the State Farm Prison located at Raiford, Florida.

While we were waiting for several hours in the main corridor the discussion of our cases became general in regards to the crimes we were in prison for, and Charlie Bath told me that he had two years for cattle stealing. I asked him if that wasn't a lot of time for a man for stealing cows, and his reply was NO, that one of the men sent to prison with him got thirty years, and the other got twenty six years. Then I asked him who the other two men were, and he told me that Dan Durley was the man who got the thirty years, and R. B. Massey was the man who got the twenty-six years, and added that Dan Durley was innocent and knew nothing about the whole affair. At this point of the conversation I asked Charlie why Durley was sent to prison if he was innocent, and his reply was that he and Massey had made an agreement beforehand that if they were caught stealing cows or with the meat, that [fol. 18] they would tell the law that they were working for Dan Durley, whom they had worked for as laborers on different occasions, but at nothing that was illegal because Durley was known to be truthful and honest, adding that he and Massey thought that by naming Durley they would be passed up and given a chance to get out of the country,

and when that didn't work that they were afraid to tell the truth and stuck to the bargain, which was false.

Bath also said that all the statements that he and Massey made on the stand at the trial were false and nature in regards to Dan Durley having any knowledge or taking any part in the crime, and if there was any way that he could help Durley, without hurting himself he would be glad to do so.

The above statement was voluntarily made without compensation of any kind or any threats upon my person, nor am I, J. E. Croft prejudiced against either party mentioned above.

J. E. Croft.

Witness: Louise Cain.
Witness: Henry H. Farrington.
Sworn to and subscribed before me this 15 day of M[illegible]947, Louise Cain.

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[fol. 19] Clerk's Certification to Exhibits "F"-"G" and "H"

In the Supreme Court of Florida:

I, Guyte P. McCord, Clerk of the Supreme Court of Florida, do hereby certify that the attached pages numbered 3, 4, 5 and 6, are true and correct copies of pages 3, 4, 5 and 6, contained in the transcript of record certified to this Court by the Criminal Court of Record for Polk County, Florida, in that certain cause lately pending in said Supreme Court wherein Dan Durley was Appellant, and State of Florida was Appellee, all as the same appears among the records and files of my said office.

In witness whereof, I have hereunto set my hand and affixed the Seal of the Supreme Court of Florida, at Tallahassee, the capital, on this the 4th day of January, A. D. 1955.

(S.) Guyte P. McCord, Clerk of the Supreme Court of Florida, (Supreme Court Seal).

[fol. 20] IN SUPREME COURT OF FLORIDA

NOTICES OF HEARING

February 10, 1955

Honorable Reeves Bowen
Assistant Attorney General
Tallahassee, Florida

In re: *Dan Durley vs. Mayo*

Dear Mr. Bowen:

I enclose herewith original and carbon copy of Petition for Writ of Habeas Corpus in the above cause. Please examine the original of the Petition and return to me to be placed on the Motion Calendar Monday, February 21, 1955. The carbon copy is for your file.

Most cordially, —— ——, Clerk Supreme Court

GPM:O'NW CC

[fols. 21-22] February 10, 1955.

Mr. Dan Durley
Florida State Prison
Box 221
Raiford, Florida

In re: *Dan Durley vs. Mayo*

Dear Mr. Durley:

I have today received from you and filed Petition for Writ of Habeas Corpus in the above cause, together with carbon copy for the Attorney General. This motion will be placed on the Motion Calendar Monday, February 21, 1955, at 9:00 o'clock A. M. You will be advised of the Court's decision.

Most Cordially, —— ——, Clerk Supreme Court.

GPM:O'NW
CC:Honorable Richard W. Ervin, Attorney General, Tallahassee, Florida.

[fols. 23-24] IN THE SUPREME COURT OF FLORIDA

DAN DURLEY, Petitioner,

vs.

NATHAN MAYO, AS PRISON CUSTODIAN OF THE STATE OF FLORIDA, Respondent.

ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS—February 22, 1955

Upon consideration of the Petition for Writ of Habeas Corpus in the above cause, it appears that the Petitioner has failed to show as a condition precedent to the Writ of Habeas Corpus, probable cause to believe that he is detained in custody without lawful authority, it is ordered, therefore, that said Petition be and the same is hereby denied.

[fol. 25] [File endorsement omitted]

IN SUPREME COURT OF FLORIDA

MOTION FOR RE-HEARING—Filed March 5, 1955

[Title omitted]

May it please the court:

Comes now the petitioner, Dan Durley, in proper person and moves this Honorable Court, to re-consider the petition for writ of habeas corpus, denied February 22nd, 1955, by reason the Court did not consider that the petition showed a condition precedent to the writ of habeas corpus, probable cause to believe that he is detained without lawful authority.

1. Does habeas corpus lie to test the validity of a judgment and sentence imposed in violation of a person's Constitutional Rights afforded him by the Constitution of the United States, and the Constitution of the State of Florida?

2. Does habeas corpus lie as an avenue for relief where a person is held under double jeopardy?

3. Where a larceny is committed and several articles,

or objects taken, at the same time, at the same place, with one intent, under the same act, is it placing the defendant under double jeopardy by dividing each object into separate counts, imposing sentence on each count, when the objects taken was one act and one intent?

4. Can a judgment and sentence be held valid, when based upon perjured testimony alone?

Questions 1, 2, and 3, must be answered in the positive, Question 4, can be answered only in the negative.

See: Hearn et al. vs. State 55 So 2d 559, where this Court said inter alia:

"We will align ourselves with the majority rule in in this country, because we feel that to permit the dividing of several larcenies of objects which are the subjects of larceny, altho belonging to separate owners, when stolen at the same time, from the same place, and under the same circumstances, with the same intent, would be violative of the spirit of the Constitution of the United States, and the State of Florida, that a man should not be put in jeopardy twice for the same offense. See also notes in 31 L. R.A., N.S., 967."

In the case at bar, the record reveal that the cattle alleged to to have been stolen under information #4172, [fol. 26] were taken at the same day, July 7th, 1945, at the same place, with one intent, under the same circumstances, hauled to the market at the same time, and only one larceny. Not having the record this allegation is supported by affidavits attached to the petition and made a part thereof as (Exhibit "E").

The said information charge, "STEALING CATTLE," meaning more than one on the 7th, day of July, 1945. Then describes the cattle as two steers, two cows and one heifer belonging to Mrs. Edna Bronson. Erroneously dividing the said larceny into three counts. The verdict of guilt as charged, meaning the larceny did include five head of cattle taken on the 7th, of July 1945.

The Florida Statute law prescribe five years the maximum sentence for such offense. Therefore, the five year sentence imposed under count two is null and void and of no effect. Likewise, the five year sentence imposed under

count three is null and void and of no effect leaving the five year sentence under count one, active.

The information #4179 charge; "STEALING CATTLE," meaning more than one taken on the 29th, day of July, 1945, describing the cattle stolen as one cow and two heifers, belonging to and the property of William C. Zipperer. The record reveal by testimony introduced by the State that the three head of cattle was taken at the same time, July 29th, 1955, at the same place, with one intent, under the same circumstances hauled to the market on one truck at the same time, sold to the same market and delivered at the same time. See affidavits attached to and made a part of the original petition as (Exhibit "E") Section 811.11 Fla Statute, 1941, F.S.A. prescribe not less than two years nor more than five years imprisonment for theft of cattle. Therefore, the five years sentence imposed under count two is null and void and of no effect. Likewise, the five year sentence imposed under count three is null and void and of no effect, as it was only one larceny committed under one act. Leaving the five year sentence active and in full force and effect.

Therefore, the five year sentence imposed under Count one of information #4172, and the five year sentence imposed under count one of information #4179, both in effect and running consecutively constitute one ten year sentence, [fol. 27] and with gain time allowed under section 954.06 Fla Statute, 1941, said ten year sentence terminated November 8th, 1951.

Since November 8th, 1951, your petitioner has been held under double jeopardy, in gross violation of the Constitution of the United States, and the Constitution of the State of Florida.

The question before the Court is, "does habeas corpus lie to test the unlawful detention, which is violative of the spirit of the Constitution of the United States and the State of Florida.

This Court ruled in the Hearn case supra on appeal, that to divide the several larcenies in to separate counts would be placing the accused person, under double jeopardy in violation of our great Constitution of the United States and the State of Florida.

The petitioner urge and contend that habeas corpus is the proper remedy to bring to the attention of the Court, that he is held under double jeopardy, in violation of his Constitutional Rights both State and Federal.

As is said by the Supreme Court of the United States, in the Smith vs. O'Grady, 312 U. S. 320:

> "The Constitution of the United States is the supreme law of the land, "and, and the obligation to guard and enforce every right guaranteed him by the Constitution rest on the State Courts equally with the Federal Courts."

The petitioner allege in petition for writ of habeas corpus that he is illegally detained, held in prison without lawful authority and in violation of Rights assured him by the Federal and State Constitution by being twice put into jeopardy for the same offense.

If the allegations are true, and the attached affidavits are true, does it entitle the petitioner to release, under habeas corpus proceedings?

A judicial inquiry into truth and substance of causes of detention of petitioner seeking writ of habeas corpus involves the reception of testimony. 28 U.S.C.A. 451, 454, 455, 457-461.

On hearing he would have the burden of sustaining his alligations by perpond-rance of evidence. It is true they [fol. 28] (might be) denied in the affidavits filed with return, to the rule, but the denial only serves to make the issue which must be resolved by evidence taken in the usual way. They can have no other office. The witnesses who made the affidavits and allegations must be subjected to examination are terms or by deposition as are all other witnesses. And, not by the pleading and affidavits alone.

Question #4. this motion.

Can a judgment and sentence be held valid when predicated solely upon perjured testimony? And, do habeas corpus lie to test the validity of said judgment and sentence?

It is shown by affidavits (Exhibit "F,G,N,") attached to and made a part of original petition, that the judgments and sentences imposed upon petitioner, and the only color

of authority the aforesaid respondent now holds your petitioner, was based entirely upon perjured testimony, if and providing the affidavits are true, and the petitioner has a right to have the affiants brought before a commissioner to be questioned as to the truth and substance thereof.

Furthermore, both informations were facts sworn to as true, and if true would constitute offense charged therein.

The informations were based upon the testimonys of R. B. Massy, Jr, and Charles Bath, and the same persons furnishing such facts on which the informations are based, by affidavits says such statements are untrue. There were no other evidence whereby the information could be based to implicate the petitioner, directly or indirectly. Therefore the facts alleged in support of the information are not true rendering the informations without basis and of no effect.

See Jones-vs-Commonwealth of Kentucky 97 F. 2d 335, Head note quoted on page 7, of original petition.

> Quote: "Where falsity of perjured testimony upon which conviction was obtained is discovered after the conviction, as well as where the testimony was known to be perjured when presented, the state must afford corrective judicial process. Const Amended 14."

[fol. 29] Petitioner further calls the Court's attention to the language used by the Supreme Court of the United States in the case of Mooney-vs-Hollohan, 231 U.S. 103 in viewing the claim of perjured testimony.

> Quote Head Note 1: "Requirements of "due process" is not satisfied by mere notice and hearing if state, through prosecuting officers acting on state's behalf, has contrived conviction through pretence of trial which in truth is used as means of depriving defendant of liberty through deliberate deception of court and jury by presentation of testimony known to be perjured, and in such case state's failure to afford corrective judicial process to remedy the wrong when discovered by reasonable diligence would constitute deprivation of liberty without due process (Const. Amend. 14)"

Head Note 2: "Fourteenth Amendment governs any action for a writ of habeas corpus presented to its courts, or its executive or administrative officers. (Const. Amend. 14)."

In the case of, Mooney-vs-Hollohan 294 U.S. 103, 102.55 S. Ct, 340.341.342.98 L.Ed. 791-98 A.L.R. 406. The United — Supreme Court said. Inter Alia:

"As is quoted in Jones-vs-Commonwe-lth CCA-6th Circuit Court Judge Sioms, 97F. (2d) 338:

"'The consepts of due process as it has become crystallized in the public mind and by judicial procurement is formulated in Mooney-vs-Hollohan, supra. Its requirement in safeguarding the liberty of the citizens against deprivation through the action of the state, embodies *embodies* those fundamental conceptions of justice which lie at the base of our civil and political institutions. Referred to in the case of:

Herbert-vs-Louisiana, 272 U.S. 312, 316, 317, 47 S. Ct. 103, 71 L. Ed. 270, 48 A.L.R. 1102, wherein it was said by the United States Supreme Court, Inter alia:

"This requirement can not be satisfied 'by mere notice and hearing if a State has contrived a conviction through the pretence of a trial, which in truth is but used as a means of depriving a defendant of liberty through a deliberate deception of Court and jury by the presentation of testimony known to be perjured. Such a contrivance by a State to procure the conviction and imprisonment of a defendant is as in-consistent with the rudimentary demands of justice as the obtaining of a like result by intimidation.' If it be urged that the concept thus formulated but condem-s convictions obtained by the State through testimony known by the prosecuting attorney (Officers) to have prejured, then the answer must be that the delineated requirements of Due Process in the Mooney case embraces no more than the facts of that case required, and that, 'the fundamental conceptions of justice which

lie at the base of our civil and political institutions, must with equal abhorrenc- condemn as a traversity. A conviction upon perjured testimony, if later, [fol. 30] but fortunately not to- late, its fals-ness id discovered, and the State in the one case as in the other is required to afford a corrective process (Judicially) to remedy the alleged wrong. If Constitutional Rights are to be preserved and not impaired.' "

In the case of Skipper-vs-Schumaker, 124 Fla. 169, Sof Rep. 58 where this Court said, Inter Alia:

"A conviction brought about by State Agent, and where man's Constitutional Rights have been violated during a proceeding, renders the conviction, *Null and Void.*"

In the case of: Walker-vs-Johnson, warden 312 U.S. 275, the Supreme Court of the United States said, Inter Alia:

"As it is said in Johnson-vs-Zerbst, 304 U.S. 458, 466, 58 S. Ct. 1019-1924; 82 L. Ed. 1461: Congress has expanded the right of a petitioner for Habeas Corpus, there being no doubt of the authority of the Congress to thus liberalize the Common Law proceedings on habeas corpus, it results that under this Section cited (451-454-455-457-461) a prisoner in custody may have a judicial inquiry into every phase and the truth and substance of the cause of his detention. Such a judicial inquiry involves the reception of testimony, as the language of the Statute show.

. . . The disposition of application for writ of habeas corpus on matters of fact as well as of law, on allegation of petitioner and traverse, and thus of the return and accompanying affidavits without taking of testimony, is improper, 28 U.S.C.A. Section 451, 454, 461."

The petitioner feel- now that he has expanded and shown a condition precedent to the issuing the writ of habeas corpus, and prima faci showing that he is held a prisoner unlawfully and in violation of his Constitutional Rights.

The case at bar is parrellel with the Hearn et al, v. State supra, and if it was in violation of the spirit of the Federal Constitution and the Constitution of the State of Florida, in the Hearn case to divide, the objects stolen and make a separate larnesy then the same rule should apply in a case parrellel, to the said case, in one as well as in the other.

Since the petitioner has twice been placed in jeopardy and is held in prison under such violation of rights assured him by the Federal Constitution, and the Constitution of the State of Florida, then habeas corpus is the proper remedy, and the writ should issue without delay.

Under question 4, this motion, the petition has quoted [fols. 31-32] excerpts from U. S. Supreme Court rulings, and Federal Circuit Court of Appeals, outstanding cases, that have become the law of the land, dealing with perjured testimony, which sufficiently show that the state must make some judicial process to right the wrong done a citizen when convicted of crime, when such conviction is based upon perjured testimony.

As is stated in the Walker vs. Johnson, supra; a prisoner in custody may have a judicial inquiry into every phase and the truth and substance of the cause of his detention.

In the several cases cited, it is apparent that to deprive a prisoner in custody the right to such inquiry is holding the petitioner without, "Due Process."

In the several cases cited a conviction by the use of false perjured testimony, is in violation of all Constitutional Rights of both Federal and State.

In the several cases cited supra, it must be a positive fact that habeas corpus lie to test such unlawful detention, either by and through the State Courts or the Federal Courts, and the petitioner has shown by allegations, sworn to and by affidavits sworn to as true, that the conviction and detention was and is based solely upon perjured testimony. There is not one iota of evidence in the records that would implicate the petitioner, except the testimonies of the co-defendants, including the sworn statement upon which the information was based upon, and the attached affidavits to the original petition certify that all statements made by each of them were false.

Wherefore the writ of habeas corpus sho-ld issue without delay.

In conclusion, petitioner prays that the writ of habeas corpus issue and for other and further relief, after the inquiry this Court may deem right and just and so will forever pray.

Respectfully submitted, Dan Durley, in proper person.

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[fols. 33-35] IN SUPREME COURT OF FLORIDA

DAN DURLEY,
Petitioner,

I Dan Durley was tried in polk County on the date of October, 19th, 1945 for the thieft of cattle, that was stold on the day of july 7th, 1945 for which I did not do I was at work on that day with, other men and Mr. L. L. Bembry, was one of them, and you will find a affidavit, on file by Mr Mimbry, and one by Mb Massey, And they are others, that will prove that I am not guilty, now on the day of july 7th, 1945, Massey and Bath swore that I was with them on that day but later they made affidavit that they give false testimony, aganest me at hte trial, and they are the ones who also give the information to the one that filed the information, and if they give false testimony, at the trial will they also give false testimony, to the one that the information, I say yes? I ask For a grand Jury investigation, but was deined, and if a grand Jury had of made an investigation, they would have found out the truth, for Massey and Bath left Polk County on the day of july 5th 1945, and went into another County on that day. they went to Osceola County, and did ont come back to Lake Wales until july 8th, they was in Osceola County until, about three oclock, 3 pm, and did not come back to Lake Wales until the 8th, july about, 8 oclock Pm, but they swore that I left Lake Wales with them, on july 7th 1945 about ten am. which is not true for they went to a Mr, Tyson home in Osceola County, on the 5th of July and I was at work on both of those daye, but I did ont know where they were ta the time of trial. but after that I had been in prison, 3

years I had a chance to talk with Mr Tyson and He told me that Massey and Bath, came to his on july the 5th and stayed theair until july 7th, about 3 Pm. if I had known this at the time of trial I would have not been sent to prison, fot crimes that I did not do, I am 63, years old, and no one ever accused me of being dishonsty, in my life until this and this is a false hood,

Dear Mr. McCord, Will you please read this for me, to the Hox Court, or get some to, as I have been in prison for ten years in august of 1955, and I have on money to pay for this great faver, All that I can do is to pray for God to give true gidence to our leaders, and now I pray that the Love of God and the saving grace of our Lord Christ be with you All now abd Every more, Amen,

I remain as ever A child of the blessed God,

respectively yours Dan Durley, (S.) Dan Durley.

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[fols. 36-37] IN SUPREME COURT OF FLORIDA

[Title omitted]

ORDER DENYING PETITION FOR REHEARING—March 22, 1955

Petitioner having filed in this cause Petition for Rehearing and having been considered, it is ordered by the Court that said Petition be and the same is hereby denied.

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[fol. 38] IN THE SUPREME COURT OF FLORIDA

[Title omitted]

DIRECTIONS OF PETITIONER TO THE CLERK FOR PREPARING TRANSCRIPT OF RECORD TO THE UNITED STATES SUPREME COURT ON PETITION FOR CERTIORARI—Filed December 8, 1955

The Clerk of the above-styled Court will please prepare a certified Transcript of the proceedings had in the above-styled cause for the use of the Petitioner on review by the United States Supreme Court on petition for certiorari of

the Final Judgment of the Florida Supreme Court, bearing date of February 22, 1955, denying petitioner's Petition for Writ of Habeas Corpus, in accordance with and conformity to the following directions:

1. Recite the filing and date of filing and copy in full petitioner's Petition for Writ of Habeas Corpus filed with the Supreme Court of Florida on February 10, 1955, together with all Exhibits attached thereto.

2. Recite the filing and date of entry and copy in full the Order of the Supreme Court of Florida, dated February 22, 1955, denying petitioner's Petition for Writ of Habeas Corpus.

3. Recite the filing and date of filing and copy in full the petitioner's Motion for Rehearing filed with the Supreme Court of Florida on March 5, 1955.

4. Recite the filing and date of filing and copy in full the statement of Dan Durley filed with the Supreme Court of Florida on March 7, 1955.

[fols. 39-40] 5. Recite the filing and date of entry and copy in full the order of the Supreme Court of Florida, dated March 22, 1955, denying petitioner's Petition for Rehearing.

6. Recite the filing and date of filing and copy in full these Directions to the Clerk for Preparing Transcript of Record.

7. Recite the filing and date of filing and copy in full the Directions to the Clerk for Preparing Transcript of Record to be filed hereafter in this cause by counsel for respondent.

8. Append to the Transcript of Record the Clerk's Certificate in the form prescribed by the Florida Supreme Court Rules of Practice, and file said Transcript of Record in the Supreme Court of the United States, Washington 13, D. C.

Respectfully submitted, Neal Rutledge, 37 N. E. First Avenue, Miami 32, Flori., Counsel for Petitioner, (S.) Neal Rutledge.

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CERTIFICATE OF SERVICE (omitted for printing)

[fol. 41] IN THE SUPREME COURT OF THE STATE OF FLORIDA

[Title omitted]

RESPONDENT'S DIRECTIONS TO THE CLERK FOR PREPARING TRANSCRIPT OF RECORD FOR THE UNITED STATES SUPREME COURT ON PETITION FOR CERTIORARI—Filed December 14, 1955.

The Clerk of this Court will please include the following in the transcript of record to be prepared for the United States Supreme Court on petition for certiorari to review this Court's judgment in the above styled cause, to-wit:

I

(a) Recite the filing and date of filing and copy in full the petition for writ of habeas corpus, together with all exhibits attached thereto, filed in this Court on the 9th day of May, 1949, by Dan Durley, petitioner, v. Nathan Mayo, as Custodian of State Prison, respondent.

(b) Recite the filing and date of entry and copy in full the order of this Court dated May 9, 1949, denying the petition for writ of habeas corpus mentioned in direction I. (a), supra.

[fol. 42] II

(a) Recite the filing in this Court on March 21, 1952, of transcript of duly certified record on appeal taken by Dan Durley, appellant, v. Nathan Mayo, as Custodian of the Florida State Prison, appellee, from the Circuit Court of the Eighth Judicial Circuit in and for Union County, Florida.

(b) Recite that said appeal transcript of record shows that on January 30, 1952, Dan Durley, petitioner, filed a petition for writ of habeas corpus against Nathan Mayo, as Custodian of the Florida State Prison, respondent, in the Circuit Court of the Eighth Judicial Circuit in and for Union County, Florida, and copy in full the said petition, together with the exhibits thereto, as the same appear on pages 1 through 11 of said transcript.

(c) Recite that said appeal transcript of record shows the issuance of a writ of habeas corpus by Circuit Judge John A. H. Murphree on January 31, 1952, and copy the same in full, together with the indorsement thereon, as the same appears on page 12 of said transcript.

(d) Recite that said appeal transcript of record shows that on February 7, 1952, the said respondent filed his return to said writ of habeas corpus before Circuit Judge John A. H. Murphree, and copy said return in full, together with the indorsements thereon, as the same appears on [fol. 43] pages 15 through 17 of said transcript.

(e) Recite that said appeal transcript of record shows that on February 7, 1952, Circuit Judge John A. H. Murphree entered an order quashing the writ of habeas corpus mentioned in paragraph (c), supra, and remanding the said petitioner to the custody of the respondent, and copy said order in full, together with the indorsement thereon, as the same appears on page 14 of the said transcript.

(f) Recite that said appeal transcript of record shows that on February 21, 1952, the said petitioner, Dan Durley, filed his notice of appeal to the Supreme Court of Florida to review the said order of February 7, 1952 quashing said writ of habeas corpus and remanding said petitioner to the respondent's custody, and copy in full said notice of appeal, with the indorsement thereon, as the same appears on page 18 of said transcript.

(g) Recite that on April 1, 1952, the Supreme Court of Florida entered its order dismissing the appeal in said cause, and copy said order in full.

(S.) Richard W. Ervin, Attorney General, (S.) Reeves Bowen, Assistant Attorney General, Counsel for Respondent.

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[fol. 44] Certificate of Service (omitted in printing)

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[fol. 45] Prior Proceedings in Florida Courts

[fol. 46] IN THE STATE SUPREME COURT OF FLORIDA, TERM A. D. 1949

DAN DURLEY, *Petitioner*,

vs.

NATHAN MAYO, as Custodian of State Prison, Raiford Florida, *Respondent*.

PETITION FOR WRIT HABEAS CORPUS—Filed May 9, 1949

*To the Honorable Justices of the State Supreme Court. Florida:*

The petitioner Dan Durley in Proper Person (or Propri Persona) says that he is a citizen of the United States, and the State of Florida that he is illegally held in the Florida State Prison by the aforesaid Custodian the cause of illegal imprisonment is a certain commitment or mittimus, which he, the aforesaid Custodian now holds against the petitioner, which was predicated upon a judgment and sentence imposed upon the petitioner, at the fall term of Court 1945 in and for Polk County, State of Florida, wherein the State of Florida, was the Plaintiff and the Petitioner was Defendant.

Your petitioner shows as follow:

The petitioner alleges that he was tried on a bill of information for the alleged crime of theft of cattle which is contrary to article (5) Amendment) U. S. Constitution, which states no person shall be held to answer for a capitol or otherwise an infamous crime, unless on a presentment of a grand jury. Nevertheless a trial was had and a verdict rendered against the petitioner and pursuant to said verdict, and judgment of the Court, the petitioner was sentenced to the Florida prison for a period of thirty years six counts of two Bills of Information. A certified copy of said indictment, is hereto attached and made a part of this petition Exhibit A and B respectively.

Petitioner alleges that he is innocent of said offense and [fol. 47] is falsely imprisoned by reason that verdict of guilt was wholly supported by *prejudge* and perjured testimony.

After I Dan Durley had served three years and five months at Raiford prison I wrote a writ of error coram nobis; in the month of February 1949, I was called back to Polk County, Bartow, Florida on this writ to prove my statements, after I got my witness ready to come from Georgia and the other witness from Lake Wales, Florida, to appear in my behalf and I had been informed to get these two witness-, I was denied a hearing on the said writ without Court being called to order. These two aforesaid witness- and affidavits would of proved that I was not guilty without a doubt in the Honorable Courts mind.

I pray and ask the Honorable Justices of the State Supreme Court of Florida to call me into there most Honorable Court for a hearing, that I may be able to prove the aforesaid statements. Please notice affidavit dated July 7th 1945 which will prove my whereabouts on said day of cattle theft.

The petitioner hereto attaches affidavits in support of his contentions marked exhibit C, D, E, respectively. Petitioner alleges that if he could of had this evidence at time of trial, there would not—been any conviction.

Conclusion

Wherefore petitioner prays the Honorable Court that a writ Habeas Corpus *is issue* directed to the aforesaid custodian Nathan Mayo, Tallahassee, Florida, that on a certain day and hour, that he have the petitioner in your Honorable Court, and to show cause for detention and on his failing to show cause for further detention, that the petitioner may go hence and for other and further relief which he might be entitled to both in law and equity. And petitioner will forever so pray.

Signature of Witness: George C. Kaufman, J. O. Andreu.

(S.) Dan Durley, Petitioner, In Pro. Pers., Box 221, Raiford, Florida.

[fol. 48] EXHIBIT "C" TO PETITION

To whom it may concern:

This is to certify that the undersigned, after first being duly sworn according to law, deposes and says that on or about the 6th day of January 1946 that he had the following conversation with one Charlie Bath, said conversation taking place at the State Farm Prison located at Raiford, Florida.

While we were waiting for several hours in the main corridor, the discussion of our cases became general in regards to the crimes we were in prison for, and Charlie Bath told me that he had two years for cattle stealing. I asked him if that wasn't a lot of time for a man for stealing a cow, and his reply was No, that one of the men sent to prison with him got thirty years, and the other got twenty six years. Then I asked him who the other two men were, and he told me that Dan Durley was the man who got the thirty years, and R. B. Massey was the man who got the twenty six years, and added that Dan Durley was innocent and knew nothing about the whole affair. At this point of the conversation I asked Charlie why Durley was sent to prison if he was innocent, and his reply was that he and Massey had made an agreement beforehand that if they were caught stealing cows or with the meat, that they would tell the law that they were working for Dan Durley, whom they had worked for as laborers on different occasions, but at nothing that was illegal because Durley was known to be truthful and honest, adding that he and Massey thought that by naming Durley they would be passed up and given a chance to get out of the country, and when that didn't work that they were afraid to tell the truth and stuck to the bargain, which was false.

Bath also said that all the statements that he and Massey made on the stand at the trial were false and untrue in regards to Dan Durley having any knowledge or taking any part in the crime, and if there was any way that he could help Durley, without hurting himself he would be glad to do so.

The above statement was voluntarily made without compensation of any kind or any threats upon my person,

nor am I, J. E. Croft, prejudiced against either party mentioned above.

Witness: Louise Cain (S.),

Witness: Henry H. Farrington (S.).

(S.) J. E. Croft.

Sworn to and Subscribed before me this 15th day of May, 1947, (N. P. Seal) (S.) Louise Cain, Notary Public.

[fol. 49] EXHIBIT "D" TO PETITION

22 March 1946

I, Buford Massey, sometimes known as R. B. Massey Jr., hereby, without offer of any compensation, agreement to aid me in any way do hereby declare that any statement, testimony that I have heretofore given that had any effect or weight in convicting Dan Durley for stealing cows in Polk County was a falsehood and that I gave such testimony, hoping that it would aid me when my case came up.

I have never used an automobile that belonged to him and that I borrowed his truck on two occasions and I told him I intended to use it for wood hauling and any stealing or butchering of cows by me was done solely by me and Charles Bath, without knowledge or consent of Dan Durley or anyone for him. He is absolutely innocent of any guilt of stealing whatsoever for which he is serving time in the penitentiary and me and my associate Charles Bath [fol. 50] are the sole guilty parties. There are some of the charges against Dan Durley that I plead guilty and also accused Dan Durley that even I don't remember, some of the charges—Dan Durley is absolutely innocent—

Dan Durley never knew of any cattle dealing on our part and never received a dime for any cows stole by us—

I butchered five or six cows for Dan Durley but they were butchered, and delivered to reputable meat markets in and around Lake Wales, Fla. The names can be supplied.

Before God is my judge Dan Durley, never had anything to do with any cattle stealing that I testified to at the trial.

Signed freely & voluntarily at the State Prison this 22 day of March 1946.

Witness: (S.) H. C. Baldwin,

Sworn to and subscribed. This statement was made before me on the 22nd day of March 1946, (S.) H. C. Baldwin, Notary Public, State of Florida at Large, My commission expires December 11, 1949. Bonded by American Surety Co. of N.Y., (S.) R. B. Massey, Jr.

Please be it noted that this statement was made absolutely, freely and with out a shade of reticence on the Part of Massey. His demeanor was such that tho he might be tough he certainly was not afraid of any of the party, with us.

(S.) H. C. Baldwin

[fols. 50A-51] EXHIBIT E TO PETITION

STATE OF FLORIDA,
County of Polk

Before the subscriber this day came L. L. Bembry, who upon being duly sworn deposes and says:

That in July 1945 I was employed on a job for J. C. Kincaid in Polk County, Florida and I remember definitely that one Dan Durley worked with me on this job on Monday, July 2, Tuesday, July 3 and on Wednesday July 4 until 2 o'clock P. M. That the said Dan Durley was off from work with me on Wednosday afternoon, July 4, and all of Thursday July 5. He worked with me Friday, July 6 all day and Saturday, July 7 until noon of that day.

I know that the above is true as I recall definitely when he worked and the days he did not.

(S.) L. L. Bembry.

Sworn to and subscribed before me on this the 14th day of December, 1945. (S.) Allie R. Barnes, Notary Public, State of Florida at Large.

My Commission expires February 9, 1948. Bonded by Mass. Bonding & Ins. Co. (N. P. Seal).

[fols. 52-53] IN THE SUPREME COURT OF FLORIDA

DAN DURLEY, PETITIONER

*v.*

NATHAN MAYO, as Custodian of State Prison, RESPONDENT

ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS

May 9, 1949

Upon consideration of the petition for writ of habeas corpus in the above cause, it appears that the petitioner has failed to show as a condition precedent to the writ of habeas corpus probable cause to believe that he is detained in custody without lawful authority, it is ordered therefore that said petition be and the same is hereby denied.

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[fol. 54] In the Circuit Court of the Eighth Judicial Circuit, in and for Union County, Florida. At Law.

No. 578

DAN DURLEY, PETITIONER

*v.*

NATHAN MAYO, as Custodian of the Florida State Prison, RESPONDENT.

PETITION FOR WRIT OF HABEAS CORPUS—Filed January 30, 1952.

To the Honorable Judges, or either of them, of the above styled Court, at law sitting:

This is the petition of DAN DURLEY, of Raiford, Union County, Florida, for a writ of habeas corpus, and thereupon your petitioner represents and alleges unto Your Honor as follows:

One

That on or about the 19th day of October, A. D. 1945, your petitioner was convicted in the Criminal Court of Record, in and for Polk County, Florida, upon two Informa-

tions, each containing what purports to be three (3) separate counts, charging "Stealing Cattle", and sentenced therefore to a term of what purports to be five (5) years for each of said counts, in each of the said Informations, and aggregating into a thirty (30) year sentence. A copy of each of the said Informations is attached hereto and made a part hereof, as is a copy of each of the said sentences, which are attached hereto and made a part hereof.

Two

That each of the said "counts" in the aforesaid Informa-
[fol. 55] tions charge the one and same crime that is charged by the other "counts" within the same Information; and each of the said "counts" does merely separate the goods which were the subject of the larceny; and that the said "counts" are not merely alternative or disjunctive, but do in fact charge the one and same crime.

Three

That the third "count" in the Information in case No. 4179 does repeat and reiterate verbatim that which is set out in the second "count" therein; and that both of the aforesaid "counts" do but repeat that same thing that is set out in the first "count" therein, and with specificity.

Four

That the maximum penalty, by way of imprisonment, for the crime of "Stealing Cattle" is five (5) years imprisonment in the State Prison.

Five

That the two Informations aforesaid, do make out but two crimes of "Cattle Stealing", and that the maximum sentence which could be meted out therefor is two five (5) year sentences to the State Prison; and that the sentences could be made consecutive, thereby making a maximum imprisonment therefor a period of ten (10) years.

Six

That your petitioner has already served, by virtue of the sentences resulting from the aforesaid Informations,

in the State Prison, a term of years, which combined with accrued gain time, is greater than the time necessary to satisfy a ten year sentence in the State Prison.

Seven

That there are no other sentences outstanding by virtue [fol. 56] of which your petitioner could at this time be imprisoned and detained.

Therefore, petitioner would show unto the Court that he is detained and imprisoned by the respondent herein, against his will and in direct violation of his rights as set out in the Constitution of the United States, and the Constitution of the State of Florida, and contrary to the laws of the State of Florida.

WHEREFORE, petitioner prays that a writ of habeas corpus issue, to be directed to the Honorable Nathan Mayo, as custodian of the Florida State Prison, respondent herein, and returnable forthwith, in order that the Court may inquire into the cause of the aforesaid restraint and detention of the petitioner, and upon such inquiry to do what shall then and there be considered lawful and proper concerning the said Dan Durley.

Petitioner further prays that the costs hereof be assessed against the State of Florida.

Dan Durley, PETITIONER

STATE OF FLORIDA,
County of Union

Before me the undersigned authority, personally appeared Dan Durley, who after being duly sworn deposes and says: That his name is Dan Durley, and that he is the petitioner in the foregoing petition, and the statements therein made are true and correct.

Dan Durley.

Sworn to and subscribed before me this 30th day of January A. D., 1952. Lawrence E. Dugger, Notary Public, State of Florida at large.

My commission expires September 19, 1954. Bonded by American Surety Co. of N. Y. (Official Seal Affixed)

Theron A. Yawn, Jr., Attorney at Law, Starke, Florida, Counsel for Petitioner.

[fols. 57-58] EXHIBIT TO PETITION

INFORMATION FOR STEALING CATTLE—[Omitted. Printed side page. 11 ante.]

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[fols. 59-60] EXHIBIT TO PETITION

SENTENCE FOR STEALING CATTLE

[Omitted: Printed side page 12 ante.]

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[fols. 61-62] EXHIBIT TO PETITION

INFORMATION FOR STEALING CATTLE

[Omitted. Printed side page 10 ante.]

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[fol. 63] EXHIBIT TO PETITION

SENTENCE FOR STEALING CATTLE

[Omitted. Printed side page 13 ante.]

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[fol. 64] CERTIFICATE OF SERVICE (omitted in printing)

[File endorsement omitted.]

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[fol. 65] IN THE CIRCUIT COURT OF UNION COUNTY

WRIT OF HABEAS CORPUS—January 31, 1952

In the name of the State of Florida:

To the Honorable Nathan Mayo, As Custodian of the Florida State Prison:

You are hereby commanded to have the body of Dan Durley, by you imprisoned and detained, as it is said, together, with the time and cause of such imprisonment and detention, by whatsoever name the said Dan Durley shall

be called and charged, before me, one of the Judges of the Circuit Court, Eighth Judicial Circuit, in and for Union County, State of Florida, at the Courthouse in Alaucha County, City of Gainesville, and State of Florida, at 11 o'clock A. M. on the 7th day of February, A. D., 1952, to do and receive what shall then and there be considered concerning the said Dan Durley and have you then and there this Writ.

Witness my hand this 31st day of January, A.D., 1952. John A. H. Murphree, Circuit Judge.

[File endorsement omitted.]

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[fol. 66] In Circuit Court of Union County

Order Quashing Writ of Habeas Corpus—February 7, 1952

This cause came on to be heard upon a writ of habeas corpus and respondent's return thereto. Argument of counsel for the respective parties having been heard, and the court, being advised in the premises.

It is, thereupon, considered, ordered, and adjudged as follows:

1. The writ is quashed and the petitioner hereby remanded to the custody of the Respondent.

2. Petitioner having asked leave to appeal, consent is hereby granted.

3. Petitioner is insolvent and the cost of this proceeding and of the appeal, if taken, shall be paid by Union County, Florida.

Done and ordered in Chambers at Gainesville, Florida, this February 7, A.D., 1952.

John A. H. Murphree, Judge

[File endorsement omitted.]

[fol. 67] IN CIRCUIT COURT OF UNION COUNTY

[File endorsement omitted.]

RESPONDENT'S RETURN TO WRIT OF HABEAS CORPUS—Filed February 7, 1952

Comes now the Respondent, Nathan Mayo, as custodian of the Florida State Prison, and for return to writ of habeas corpus issued in this cause, says:

1

He admits that on October 19, 1945, the petitioner was convicted in the Criminal Court of Record of Polk County under each of the three counts of each of two informations, and that the petitioner received a five-year sentence under each of said six counts, to run consecutively. He admits that the exhibits attached to the petition herein are substantially correct copies of the charging parts of the informations, and of the judgments and sentences, in said cases.

2

He denies the allegations of paragraph Two of the petition herein, and each of them severally. He denies that any count of either of said informations charges the same larceny as is charged in the other counts of the same information, or either of them. He denies that the larceny charged any count of either of said informations was committed at the same time and place and under the same circumstances as the larceny charged in the other counts of the same information, or either of them.

3

He admits that counts 2 and 3 of the information in case #4179 (which information charged the larceny of animals belonging to William C. Zipperer) are couched in similar verbiage, but he denies that the larceny of heifer charged in the third count is the same larceny as the larceny of [fol. 68] heifer charged in the second count. He denies the petitioner's allegations that the second and third counts "do but repeat that same thing that is set out in the first 'count' therein, and with specificity".

4

He admits the allegations of paragraph Four of the petition.

5

He denies that the said two informations made out only two crimes of cattle stealing, and he says that each count of each of said informations charged a separate, distinct larceny of cattle. He denies that the maximum sentence which could be meted out under each information was five years, and says that it was lawful to impose a five-year sentence under each count of each information, and to prescribe that they run consecutively.

6

He admits the allegations of paragraphs Six and Seven of the petition.

7

He admits that he holds the petitioner in custody under and by virtue of said sentences, but he denies that said custody is unlawful.

8

He produces the body of the petitioner before the Court at the time of making this return.

Respectfully submitted, Nathan Mayo, as Custodian of the Florida State Prison, Respondent. Richard W. Ervin, Attorney General, Reeves Bowen, Assistant Attorney General, Counsel for Respondent.

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[fol. 69] [File endorsement omitted.]

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[fols. 70-71] IN CIRCUIT COURT OF UNION COUNTY

NOTICE OF APPEAL—Filed February 21, 1952

The petitioner, Dan Durley, takes and enters his appeal to the Supreme Court of Florida to review the judgment or order of the Circuit Court of Union County, Florida, bearing date the 7th day of February, 1952, entered in the above

styled cause and recorded in Circuit Court Minute Book 2 at page 217, whereby the Writ of Habeas Corpus issued out of said Court on the 31st day of January, 1952, in behalf of the said petitioner was ordered quashed and the petitioner remanded to the custody of the respondent.

All parties to this cause are hereby called upon to take notice of this appeal.

Theron A. Yawn, Jr., 119 East Call Street, Starke, Florida, Attorney for Petitioner.

[File endorsement omitted.]

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[fol. 72] IN THE SUPREME COURT OF FLORIDA

DAN DURLEY, APPELLANT,

*vs.*

NATHAN MAYO, AS CUSTODIAN OF THE FLORIDA STATE PRISON, APPELLEE

ORDER DISMISSING APPEAL—April 1, 1952

Upon consideration of motion of counsel for Appellee to dismiss the appeal in this cause, it is ordered that said motion be and the same is hereby granted and the appeal which was entered herein in the Circuit Court of Union County, Florida, on February 21st, 1952, be and the same is hereby dismissed.

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[fol. 73] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 74] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—October 24, 1955

On petition for writ of Certiorari to the Supreme Court of the State of Florida

On consideration of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby granted and the case is transferred to the appellate docket at No. 489.

October 24, 1955.

(6238-0)

# SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1955**

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## No. 489

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DAN DURLEY,

*Petitioner,*

*vs.*

NATHAN MAYO, CUSTODIAN, FLORIDA STATE PRISON,

*Respondent.*

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ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA

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## BRIEF FOR THE PETITIONER

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NEAL P. RUTLEDGE,
*37 N. E. First Avenue,*
*Miami, 32, Florida,*
*Counsel for Petitioner.*

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1955

# No. 489

DAN DURLEY,

*Petitioner,*

*vs.*

NATHAN MAYO, CUSTODIAN, FLORIDA STATE PRISON,

*Respondent.*

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA.

## BRIEF FOR THE PETITIONER

### Opinion Below

The Supreme Court of Florida did not file an opinion. Neither its Order Denying Petition for Writ of Habeas Corpus (R. 20) nor its Order Denying Petition for Rehearing (R. 29) has been officially reported.

### Jurisdiction

Jurisdiction of the Supreme Court of the United States is invoked pursuant to Title 28, United States Code, Section 1257(3). The final judgment of the Supreme Court of Flor-

ida denying petitioner's claim that he is imprisoned in violation of his rights and immunities under the Fourteenth Amendment to the Constitution of the United States was rendered February 22, 1955 (R. 20). A timely petition for rehearing was considered and denied on March 22, 1955 (R. 29). Petitioner's motion for leave to proceed *in forma pauperis* and his petition for writ of certiorari were filed with this Court on April 18, 1955, and were granted on October 24, 1955 (R. 46).

## Constitutional Provisions and Statutes Involved

The Constitutional and statutory provisions involved are set forth in the Appendix hereto, pp. 34-38. Their official citations are as follows:

1. Section 1, Fourteenth Amendment, Constitution of the United States, Volume I, United States Code 1952 ed., pp. XLV-XLVI.

2. Fifth Amendment, Constitution of the United States, Volume I, United States Code 1952 ed., p. XLIV.

3. Eighth Amendment, Constitution of the United States, Volume I, United States Code 1952 ed., p. XLV.

4. Section 811.11, Chapter 811, Title XLIV, Volume II, p. 2669, The Official Florida Statutes 1953; 22 F. S. A. 811.11.

5. Section 811.12, Chapter 811, Title XLIV, Volume II, p. 2669, The Official Florida Statutes 1953; 22 F. S. A. 811.12.

6. Section 954.06, Chapter 954, Title XLVI, Volume II, pp. 2851-2852, The Official Florida Statutes 1953; 24 F. S. A. 954.06.

7. Section 79.10, Chapter 79, Title VI, Volume I, p. 334, The Official Florida Statutes 1953; 6 F. S. A. 79.10.

Each of the above-cited Florida Statutes was in effect on the date of petitioner's convictions and has not since been amended except that Section 954.06, F. S. '53, relating to gain time for good behavior of convicts, was twice amended in a way not affecting this controversy during the period between petitioner's convictions and the filing of his petition for writ of habeas corpus in this case. However, the statute is reproduced in the Appendix both as it was on the date of petitioner's convictions and on the date this action was instituted.

## Questions Presented

### I

Where the Florida Supreme Court has repeatedly ruled that it is always open to hear on petition for writ of habeas corpus the claims of persons who contend they have been convicted or sentenced in violation of their Constitutional rights, does the decision of the Florida Supreme Court in this case denying a petition for writ of habeas corpus, without requiring an answer or holding a hearing, involve a determination of Federal questions affording this Court jurisdiction to review the decision where the petition alleged facts supporting petitioner's claim that he is imprisoned in violation of his rights and immunities under the Fourteenth Amendment to the Constitution of the United States?

### II

Does the imposition by a State of three separate sentences for a single offense, each sentence being for the maximum terms prescribed by statute and each to be served consecutively, violate the due process clause of the Fourteenth Amendment to the Constitution of the United States?

III

Where an accused's conviction was obtained solely on the basis of perjured testimony of two co-defendants who corruptly agreed to implicate the accused, hoping to relieve themselves of the full onus of the crime, and where both co-defendants have admitted such perjury within a few months after the conviction, does a State's continued imprisonment of the accused on the basis of such a conviction violate the due process clause of the Fourteenth Amendment to the Constitution of the United States?

**Statement of the Case**

On February 10, 1955, petitioner filed a petition for writ of habeas corpus, together with eight attached exhibits, with the Supreme Court of Florida (R. 1-18). That Court set the petition down for preliminary hearing on February 21, 1955 (R. 19). At that hearing respondent was represented by counsel, but petitioner, being imprisoned by respondent and without funds to retain a lawyer (R. 29), could neither be present nor represented (R. 19, see petitioner's sworn motion to proceed *in forma pauperis* filed with this Court April 18, 1955). On February 22, 1955, the Court below denied the petition without affording petitioner a hearing and without requiring a response from respondent (R. 20). The expressly and only stated ground for the Court's order was that petitioner had failed to show probable cause to believe that he is detained in custody without lawful authority (R. 20). Thereafter, petitioner's timely motion for rehearing (R. 20) was considered and denied on March 22, 1955 (R. 29).

In these circumstances, the allegations of the petition must be taken as true for purposes of review by this Court. *Hawk* v. *Olson* (1945), 326 U.S. 271, 273; *White* v. *Ragen*

(1945), 324 U. S. 760, 763. These allegations are as follows:[1]

On or before July, 1945, two citizens of Polk County, Florida, R. B. Massey, Jr. and Charles Bath, associated together and determined to become cattle rustlers (R. 17, 16). These men had worked on different occasions as laborers for petitioner, who enjoyed a reputation for truthfulness and honesty in the community (R. 17). For this reason, both men thought it would go easier with them, should they unhappily be caught, if they falsely implicated petitioner as their employer in crime (R. 16, 17). They therefore agreed before launching their career as rustlers "that if they were caught stealing cows or with the meat, that they would tell the law that they were working for Dan Durley." (R. 17).

One of the two confederates, Massey, borrowed and used petitioner's truck on two occasions, saying he intended to use it for hauling wood (R. 16). Although not explicitly stated in Massey's affidavit, it can reasonably be inferred from that affidavit that Massey and Bath actually used the truck on those occasions for stealing cattle (R. 16-18).

In the due course of events Massey and Bath were caught stealing cattle, and true to their corrupt bargain, falsely implicated petitioner as their employer in crime (R. 24, 28).

On this basis, and without a Grand Jury investigation (R. 28), the County Solicitor for Polk County filed two informations charging petitioner, Massey, and Bath, with

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[1] Petitioner drew the petition himself while incarcerated without benefit of counsel. A reading of both this petition and the petition for certiorari discloses that petitioner must be a layman without a great deal of formal education. In these circumstances both this Court and the Supreme Court of Florida have held that they will not hold such a person to the standard of a skilled legal draftsman. *Rice* v. *Olson* (1945), 324 U.S. 786, 791-792; *Tomkins* v. *Missouri* (1945), 323 U.S. 485, 487; *Chase* v. *State* (1927), 93 Fla. 963, 113 So. 103, 106; *Ex Parte Amos* (1927), 93 Fla. 5, 112 So. 280, 291-292; See *Darr* v. *Burford* (1950), 339 U.S. 200, 203-204.

six offenses of stealing cattle, each information containing three separate counts purporting to charge an offense (R. 9-10). The three counts of one information (R. 9-10) charged: (1st Count) that the three defendants on July 7, 1945, in Polk County, Florida, did steal and carry away two steers belonging to a Mrs. Edna P. Bronson; (2nd Count) that the three defendants on July 7, 1945, in Polk County, Florida, did steal and carry away two cows belonging to Mrs. Edna P. Bronson; and (3rd Count) that the three defendants on July 7, 1945, in Polk County, Florida, did steal and carry away one heifer belonging to Mrs. Edna P. Bronson.

The three counts of the other information (R. 10-11) charged: (1st Count) that the three defendants on July 29, 1945, in Polk County, Florida, did steal and carry away one cow belonging to William C. Zipperer; (2nd Count) that the three defendants on July 29, 1945, in Polk County, Florida, did steal and carry away one heifer belonging to William C. Zipperer; and (3rd Count) that the three defendants on July 29, 1945, in Polk County, Florida, did steal and carry away one heifer belonging to William C. Zipperer.

It is to be noted that the second and third counts of this last information are virtually identical (R. 11).

At the trial held in the Criminal Court of Record for Polk County, petitioner asserted his innocence, but was found guilty by a jury (R. 12) solely on the testimony of the two co-defendants, Massey and Bath, both of whom admitted their guilt and implicated petitioner (R. 7, 6, 14). The evidence at the trial, including the testimony of Massey and Bath, showed clearly and without dispute that the five cattle (two steers, two cows, and one heifer) alleged to have been stolen from Mrs. Edna P. Bronson on July 7, 1945, were stolen by Massey and Bath at the same time, from the same place, under the same circumstances, and with the same intent (R. 3, 6, 14, 16-18, 21). Similarly, the State's evidence showed clearly and without dispute that the three

cattle (one cow and two heifers) alleged to have been stolen from William C. Zipperer on July 29, 1945, were stolen by Massey and Both at the same time, from the same place, under the same circumstances, and with the same intent (R. 4, 14, 22). The five cattle stolen on July 7, 1945, and the three cattle stolen on July 29, 1945, were in each case all on the same range, rounded up together, shot, skinned, butchered, and dressed at the same time and place, and their remains hauled off together on the same truck to the same market and sold all together (R. 3, 4, 6, 14, 21, 22).

At the conclusion of the trial, Judge Amidon sentenced petitioner to five years imprisonment on each of the six counts contained in the two informations, each sentence to be served consecutively, hereby making a total sentence of thirty years' imprisonment (R. 12-14). Co-defendant R. B. Massey, Jr., was sentenced to twenty-six years' imprisonment (R. 17), and co-defendant Charles Bath received a sentence of two years' imprisonment (R. 17). At the time of sentencing, petitioner was 53 years old and had never before been accused of any dishonesty (R. 29).

Petitioner was sentenced October 19, 1945 (R. 13-14), and under the terms of Florida's "gain time" for good conduct statute, Section 954.06, F. S. '53, has now served time enough to more than discharge a 15 year sentence.

Within four months after the above-described proceedings, Charles Bath admitted to a fellow inmate in the State prison that he and Massey had falsely implicated petitioner in their crimes pursuant to their prior corrupt scheme, that he had testified falsely against petitioner at the trial, and that petitioner was innocent of the charges upon which he had been convicted (R. 17-19).

And within six months after those proceedings, the other co-defendant, Massey, executed an affidavit swearing that he had testified falsely against petitioner at the trial, that the crimes charged had been committed "solely by me and Charles Bath, without knowledge or consent of Dan

Durley or anyone for him" and that "Dan Durley is absolutely innocent." (R. 16).

After unsuccessfully seeking relief by petitions for writ of error *coram nobis* (R. 34), petitioner on May 9, 1949, filed a hand-written, self-drawn petition for writ of habeas corpus with the Supreme Court of Florida (R. 33). The only Federal claim or right asserted in this petition was that petitioner had been proceeded against by a bill of information contrary to the Fifth Amendment to the Constitution of the United States (R. 33-34). Elsewhere in this petition it is alleged that petitioner was convicted wholly on "prejudge (sic) and perjured testimony." (R. 33). The petition contained no allegation and did not present the contention that the petitioner had been improperly convicted and sentenced for six offenses, rather than for two (R. 33-37). This petition was denied summarily on the same day it was filed, without a hearing or requiring a response (R. 38).

Again on January 30, 1952, petitioner with the aid of court-appointed counsel filed a petition for writ of habeas corpus with Judge Murphree of the Circuit Court of Union County, Florida (R. 38). In this petition, drawn by a lawyer, it was asserted that the two informations upon which petitioner was convicted actually charged only two offenses, for each of which the maximum penalty was five years, and that petitioner had already served sufficient time to satisfy a ten year sentence (R. 38-40). The only Federal claim asserted was the vague, generalized contention that petitioner was imprisoned in "violation of his rights as set out in the Constitution of the United States." (R. 40).

Judge Murphree issued the writ on January 31, 1952, and respondent filed his return on February 7, 1952, denying that the larceny charged in any of the counts of the two informations was the same larceny as those charged in the other counts (R. 33), and denying a non-existant allegation *not* made in the petition, to-wit, that any two of

the six larcenies charged were committed under the same circumstances (R. 43, paragraph 2).

On that same day, February 7, 1952, Judge Murphree heard argument of counsel of both parties and thereupon quashed the writ and remanded petitioner to respondent's custody (R. 42). While it does not appear of record in this cause presently before this Court because respondent was not required to respond below and did not formally assert his prior proceeding as a bar by pleadings to which petitioner could have replied, petitioner is nevertheless prepared to show that Judge Murphree did not hold a hearing on the merits of petitioner's claims, or attempt to resolve the factual disputes between the parties, but rather was persuaded by the argument of respondent's counsel that the prior dismissal of petitioner's previous petition for writ of habeas corpus by the Florida Supreme Court on May 9, 1949, had settled petitioner's contentions adversely to him and barred their assertion in the Circuit Court (see pp. 1-2 of petitioner's brief in reply to respondent's brief in opposition to petition for certiorari filed with this Court September 6, 1955).

Petitioner's appeal from the order of Judge Murphree quashing the writ was dismissed by the Florida Supreme Court on April 1, 1952, on motion of respondent (R. 45).

## Summary of Argument

I. The Florida Supreme Court in this case considered, ruled upon, and denied petitioner's claim of rights and immunities under the Due Process Clause of the 14th Amendment. In Florida the remedy of habeas corpus is available as of right to one claiming he is imprisoned in violation of his Federal or State Constitutional rights, and such proceedings may be originally instituted either in the various circuit courts or in the Florida Supreme Court. The inquiry in such cases may involve both ques-

tions of fact and law, and a petitioner is not limited to showing only defects which appear on the face of the record. The petition in this case was not barred by previous adverse rulings on prior petitions because the contentions here raised were not presented or determined in the prior proceedings, the defense of former adjudication was not pleaded as is required, and in any event such defense is a discretionary one which the Florida Supreme Court properly chose not to rely upon in this case as is shown by the very fact that the Court below considered the petition on its merits and based its ruling solely on the express ground that the petition did not state a cause of action, i.e., did not show probable cause to believe petitioner was detained without lawful authority.

II. Under the facts alleged in the petition, which must be taken as true on this review, petitioner was unlawfully convicted and punished three times for a single offense committed on July 7, 1945, and was also unlawfully convicted and punished three times for a single offense committed on July 29, 1945. The maximum prison sentence prescribed by statute for each offense charged was only five years, or a total of ten years for the two crimes, but petitioner was sentenced to a total of thirty years in prison. Such action by a State is in flagrant disregard and clearly offensive to those basic canons of decency and fairness which express the notions of Justice of English-speaking people and are implicit in the concept of ordered liberty. Such State action therefore violates the due process clause of the 14th Amendment. In addition, the right or immunity expressed in the 5th Amendment against double jeopardy and in the 8th Amendment against cruel and unusual punishments are rights and immunities which are so rooted in the traditions and conscience of our people as to be protected against State infringement by the Due Process Clause of the 14th Amend-

ment. Florida's action in this case plainly violates such rights and immunities.

III. On petitioner's undenied allegations, supported by the most persuasive and convincing evidence or showing that could possibly be made without a hearing, petitioner is innocent of the charges against him and was convicted solely on the basis of the perjured testimony of two frightened, depraved co-defendants, his former employees, pursuant to their deliberate, venal scheme falsely to implicate petitioner with their misdeeds in a calculated attempt to relieve themselves of the full responsibility and onus of their own independent actions. As a result, petitioner was sentenced at age 53 to 30 years in prison. Such injustice cries out for correction. It shocks the conscience of any man of heart and right feeling. Surely in this day and age our judicial processes are not so feeble and unenlightened as to provide no remedy for such an unfortunate person. Due Process of Law commands that a State provide one who makes a *prima facie* showing such as petitioner has in this case some fair opportunity to establish his innocence.

## Argument

I. THE FLORIDA SUPREME COURT FULLY CONSIDERED, RULED UPON, AND DENIED PETITIONER'S CLAIMS THAT HE IS IMPRISONED IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE 14TH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

### A. *The Petition for Writ of Habeas Corpus Properly Raised With The Required Precision Petitioner's Claim That He Is Imprisoned In Violation Of His Rights Under The Due Process Clause of The Fourteenth Amendment.*

While this Court has held that a mere reference to the "Constitution of the United States" or "due process

of law" may not be sufficient to raise a Federal question in a State Court (Herndon v. Georgia (1935), 295 U.S. 441, 442-3; *Bowe* v. *Scott* (1914), 233 U.S. 658, 664-5), the petition in this case does not suffer from such a defect. Here, petitioner specifically asserted that his imprisonment is in violation "of the Due Process Clause of the 14th Amendment to the Constitution of the United States of America." (R. 1). No greater precision than this could fairly be required.

B. *Under Florida Law Petitioner In This Case Properly Invoked The Remedy Of Habeas Corpus In The Proper Court.*

The Florida Constitution vests the State Supreme Court, each of the Justices thereof, the various Circuit Courts and the Judges thereof each with concurrent jurisdiction to issue writs of habeas corpus. Sections 5 and 11, Article V, Constitution of the State of Florida, Volume I, pp. 11-12, The Official Florida Statutes 1953. It is therefore plain and clear that the Court below had the power to entertain this case.

Moreover, there is no rule in Florida that a person should first apply to a lower court for the writ. See *ex parte Hawk* (1944), 321 U.S. 114, 116. This is shown by the large number of cases wherein the Florida Supreme Court has entertained an original proceeding for habeas corpus, and particularly by the recent case of *Shoemaker* v. *Mayo* (1954), Fla., 75 So. 2d 690. In the Shoemaker case, a prisoner filed his petition for habeas corpus originally with the Florida Supreme Court, claiming a denial of his constitutional rights in that he had been sentenced on a plea of guilty, which allegedly he had entered while under the influence of some narcotic drug previously administered to him. The Florida Su-

preme Court issued the writ, the respondent filed an answer denying the petitioner's factual allegations, and the Supreme Court thereupon appointed a commissioner to take testimony and report his findings. As it developed, petitioner's factual claims were utterly without foundation and the writ was quashed. In doing so, however, the Florida Supreme Court stated:

> "Though the court is always open to hear the claims of persons who contend that they have been convicted or sentenced in violation of constitutional rights, its jurisdiction is not to be trifled with or its processes abused by persons who invoke its jurisdiction through deliberate falsification or wilful misrepresentation of material facts." 75 So. 2d 690, 691.

It is obvious from this ruling and the Court's actions in the *Shoemaker* case that not only will the Florida Supreme Court entertain an original habeas corpus proceeding where a petitioner makes a substantial claim that he has been convicted or sentenced in violation of his constitutional rights, but that such a proceeding may involve alleged defects (as they did there) which are not apparent on the face of the record and which involve factual issues.

Similarly, by way of example, in the following cases the Florida Supreme Court has consistently entertained on the merits in original proceedings petitions for a writ of habeas corpus by prisoners challenging their detention on the ground their judgment of conviction or sentence was either invalid or unauthorized: *Ex Parte Browne* (1927), 93 Fla. 332, 111 So. 518 (Petitioner's sentence held invalid as violative of provision in Florida Constitution against *ex post facto* laws); *Ex parte Simmons*

(1917), 73 Fla. 998, 75 So. 542, 543 (prisoner's sentence for larceny held invalid "as a sentence in excess of the period for which the petitioner could lawfully be imprisoned on a single conviction for grand larceny."); *Hall* v. *Mayo* (1955), Fla., 83 So. 2d 845 (prisoner's petition for rehearing treated as new and second petition for habeas corpus and prisoner ordered discharged as his two sentences for cattle stealing ran concurrently rather than consecutively); *Sparkman* v. *State Prison Custodian* (1944), Fla., 18 So. 2d 772 (prisoner's sentence as a second offender held invalid as prisoner had not actually been previously convicted and prisoner, having served maximum sentence for a first offense, ordered discharged); *Collingsworth* v. *Mayo* (1955), Fla., 77 So. 2d 843 (prisoner's 20 year sentence imposed in 1948 held void as in excess of 15 year maximum penalty imposed by statute for offense charged and prisoner ordered remanded for proper sentence); *State* v. *Mayo* (1937), 128 Fla. 843, 175 So. 808 (error in sentence of prisoner as a second offender, not apparent on face of judgment or sentence, held to render part of judgment and sentence imposed for prisoner's being a second offender illegal and void; here the writ was granted by a Justice of the Supreme Court, but was made returnable before a Circuit Judge); *Ex parte Wilson* (1943), 153 Fla. 459, 14 So. 2d 846 (Judge improperly adjudged and sentenced prisoner for a crime not described in the statutes; prisoner ordered remanded for imposition of a proper judgment and sentence); *Allison* v. *Mayo* (1947), Fla., 29 So. 2d 750 (jury improperly convicted prisoner of two offenses arising out of one transaction by rendering a general verdict of guilty on a two count information charging similar but inconsistent offenses; *held:* such error may be asserted by collateral attack in original habeas corpus proceedings, the only

valid judgment and sentence in such a case is on the lesser offense, and the prisoner, having served the maximum period for the lesser offense, is entitled to be discharged).

Other cases, initially arising in the circuit courts, have likewise held that the remedy of habeas corpus is available in a case such as this. Thus, in *Faison* v. *Vestal* (1916), 71 Fla. 562, 71 So. 759, the Supreme Court of Florida ruled that habeas corpus was a proper remedy for one claiming to be improperly punished twice for the same offense. Such a holding shows Florida is in accord as to the availability of habeas corpus to remedy improper double punishments with both the Federal rule and that in other jurisdictions. See *Bertsch* v. *Snook* (CA 5, 1929), 36 F. 2d 155; *Ex parte Rose* (DC Mo., 1940), 33 F. Supp. 941; *Sprague* v. *Aderholt* (DC Ga., 1930), 47 F. 2d 790; *Re Nichols* (1927), 82 Cal. App. 73, 255 P. 244.

Similarly, in *McDonald* v. *Smith* (1914), 68 Fla. 77, 66 So. 430, the Court below ruled that a judgment and sentence which had been affirmed on appeal "may be collaterally assailed in habeas corpus proceedings" as wholly unauthorized by law. As stated only recently by the Florida Supreme Court in *Collingsworth* v. *Mayo* (1955), Fla., 77 So. 2d 843, 844:

> "It is settled in this jurisdiction that where the sentence imposed on a criminal charge is in excess of that authorized by law, a defendant held in custody pursuant to such sentence is entitled, in a habeas corpus proceeding, to be remanded for a proper sentence."

Moreover, the remedy by habeas corpus in such cases is a matter of right, the writ under Florida law being a prerogative writ of right and not discretionary. *Ex parte Amos* (1927), 93 Fla. 5, 112 So. 289, 291.

Petitioner therefore respectfully submits that it is abundantly clear from the foregoing cases that he invoked in

this case the proper remedy in the proper forum, and that if petitioner in truth is being imprisoned in violation of his Federal Constitutional rights afforded by the Due Process Clause of the Fourteenth Amendment, under the facts and circumstances as alleged in this case, the remedy of habeas corpus is fully available to him under Florida law. Indeed it is a matter of considerable pride and credit to the State that few, if any, jurisdictions have accorded the Great Writ any broader scope or greater respect than Florida. Compare *White* v. *Ragen* (1945), 324 U. S. 760; *Pyle* v. *Kansas* (1942), 317 U. S. 213; *Cochrane* v. *Kansas* (1942), 316 U. S. 255; *Rice* v. *Olson* (1945), 324 U. S. 786.

### C. *The Petition for Habeas Corpus Was Not Barred by Former Adjudications*

Respondent has contended in opposing the petition for writ of certiorari in this case that a remedy by way of habeas corpus in this case is barred by former adjudications. While at common law the doctrine of *res judicata* did not extend to a decision on habeas corpus refusing to discharge a prisoner, *Salinger* v. *Loisel* (1924), 265 U. S. 224, 230, this rule has been modified in Florida by statute. Section 79.10, F. X. '53, Appendix, P. 38. It is to be noted, however, that this statute does not apply the traditional doctrines of *res judicata* to habeas corpus proceedings with their full force and vigor. Thus, while an ordinary civil judgment is conclusive as between the parties not only as to all matters actually litigated, but those which might have been raised as well, Section 79.10, F. S. '53, provides only that a person remanded to custody as the result of a prior habeas corpus action shall not be at liberty "to obtain another habeas corpus *for the same cause*" or to relitigate "the same matter again." It is submitted, therefore, that this statute only bars the relitigation of questions and matters *actually* presented and decided. See *State* v. *Drum-*

*right* (1934), 116 Fla. 496, 156 So. 721, 723-24; *State ex rel. Williams* v. *Prescott* (1933), 110 Fla. 261, 148 So. 533.

With this in mind, petitioner vigorously contends that his petition for habeas corpus in this case was not barred by prior adverse rulings. While some of the reasons supporting petitioner's position may seem unduly technical, it should not be forgotten that the defense itself is a highly technical and drastic one and merits strict application so as not to expand it beyond its limits and work a harsh result.

1. The Federal Questions Here Raised Were Not and Could Not Have been Determined in the Prior Proceedings upon Which Respondent Relies

The two prior proceedings upon which respondent relies as barring this action are the petition for habeas corpus filed by petitioner with the Florida Supreme Court on May 9, 1949 (R. 33-37) and the petition for habeas corpus filed by petitioner's court-appointed counsel in the Circuit Court for Union County on January 30, 1952 (R. 38-41). Neither of these petitioners, however, raised the Federal questions here involved. Indeed, the May 9, 1949 application did not in any way raise the double punishment contention here asserted, and it would have been premature if it had since by that date petitioner had not yet served sufficient time to discharge an unchallenged ten years sentence. See *Finch* v. *Mayo* (1955), Fla., 79 So. 2d 770. Moreover, the previous denial of a premature petition for habeas corpus will not bar the granting a later petition which is not premature. See *Hall* v. *Mayo* (1955), Fla., 83 So. 2d 845.

It is true that the May, 9, 1949 petition did assert that petitioner was convicted on the sole basis of the perjured testimony of his co-defendants (R. 33-37), but no violation of Federal rights was claimed in connection therewith. The only Federal claim made was that petitioner had been proceeded against by information rather than by in-

dictment by a Grand Jury contrary to the 5th Amendment of the United States Constitution (R. 33). This can hardly be construed as raising the question here presented, to-wit, whether the Due Process Clause of the 14th Amendment requires a State to afford one who makes a *prima facie* showing such as petitioner's some opportunity to show his innocence. Accordingly, it is submitted that the denial of the May 9, 1949 petition in no way ruled upon or settled any of the claims here made by petitioner.

Similarly, the January 30, 1952, petition which was drawn by a lawyer, did not present any Federal questions for decision (R. 38-41). The only reference to Federal rights contained therein is the vague, passing assertion in Paragraph Seven thereof (R. 40) that petitioner is imprisoned in violation of his rights "as set out in the Constitution of the United States." Such a vague claim, asking a judge to search through that whole basic document, has been repeatedly held by this Court to be insufficient (at least when made by a party represented by counsel as petitioner was) to raise or present any Federal question. *Herndon* v. *Georgia* (1935), 295 U. S. 441, 442-3; *Harding* v. *Illinois* (1904), 196 U. S. 78, 85-88. Accordingly, it is likewise submitted that the denial of the January 30, 1952, petition in no way passed upon or barred the consideration of the claims petitioners has asserted in the petition involved in this case.

2. The Decision Below Did Not Rest upon the Defense of Former Adjudication Because Such Defense Was Not Affirmatively Pleaded as Required by Florida Law

Under the Florida Rules of Civil Procedure, as under the Federal Rules, the defense of *res judicata* must be affirmatively set forth in a responsive pleading. Rule 1.8, Florida Rules of Civil Procedure, 30 F. S. A., 1954 Supplement, p. 64, Failure to do so may result in a waiver of the defense. Thus in *Taylor* v. *Chapman* (1937), 127

Fla. 401, 173 So. 143, 144, it was held in a habeas corpus proceeding that a prior habeas corpus judgment which was not pleaded in respondent's return nor thereafter called to the Court's attention could not be relied upon as barring the action. The purpose of this rule is certainly wholesome. When dealing with such a technical and drastic defense, the petitioner should have every opportunity to be appraised of the contention that his action is absolutely and forever barred and to refute that contention with every counter-argument he can.

It follows, petitioner submits, that the Court below could not, would not, and did not base its Order upon such a defense which had not been pleaded.

3. The Defense of Former Adjudication, Being Discretionary with the Court, Was Not Relied Upon in This Case.

The Florida Supreme Court has repeatedly ruled that "the salutary principle that the doctrine of *res judicata* should not be so rigidly applied as to defeat the ends of justice" is a part of the law of Florida. *Universal Const. Co. v. City of Fort Lauderdale* (1953), Fla., 68 So. 2d 366, 369. Pursuant to this principle, the Court has stated that it "is more interested in the fair and proper administration of justice than in rigidly applying a fiction of the law designed to terminate litigation." 68 So. 2d 366, 369.

Certainly, no more fitting situation for the application of these principles could be imagined than the case at Bar where, but for their application, a man would be unconstitutionally condemned to spend his remaining days on Earth in prison (assuming, *arguendo*, that otherwise the doctrine of *res judicata* would bar this action.)

Construing the Order of the Court below, therefore, in the light of these basic principles, it is clear that the Florida Supreme Court did not deny the petition in this case

because it considered the action barred by prior rulings. (See R. 20). Indeed, the Order makes no mention of the prior adjudications nor even indicates that the Court was aware of their existence.

D. *The Order of the Florida Supreme Court Shows On Its Fact the Court Considered the Petition On Its Merits.*

The Order of the Florida Supreme Court states simply (R. 20):

> "Upon consideration of the Petition for Writ of Habeas Corpus in the above cause, it appears that the Petitioner has failed to show as a condition precedent to the Writ of Habeas Corpus, probable cause to believe that he is detained in custody without lawful authority; it is ordered, therefore, that said Petition be and same is hereby denied."

This Order shows on its face that the Court considered the petition on its merits and necessarily ruled on the Federal claims asserted therein, denying their legal validity.

II. THE STATE OF FLORIDA HAS CONVICTED AND PUNISHED PETITONER THREE TIMES FOR A SINGLE OFFENSE IN VIOLATION OF HIS RIGHTS AND IMMUNITIES UNDER THE DUE PROCESS CLAUSE OF THE 14TH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

A. *Petitioner Was Convicted and Punished Three Times for a Single Offense*

As both this Court and the Supreme Court of Florida have ruled, the undenied allegations in a petition for habeas corpus, which is dismissed without a hearing or an answer being filed, must be taken as true. *Hawk* v. *Olson* (1945), 326 U. S. 271, 273; *State ex rel. Lihtz* v. *Coleman* (1941), 149 Fla. 28, 5 So. 2d 60, 61.

In this case, the undenied allegations of the petition show that petitioner was convicted and punished three times for

a single offense committed on July 7, 1945, and was also, and on the same day, convicted and punished three times for a single offense committed on July 29, 1945.

Under Florida law it is clear and beyond dispute that the larceny of a number of cattle which are all stolen at the same time, from the same place, under the same circumstances, and with the same intent constitutes but a single offense. *Hearn* v. *State* (1951), 55 So. 2d 559, 28 A.L.R. 2d 1179. This is true regardless of whether the cattle stolen all belong to the same owner or not. *Hearn* v. *State, supra.* And specifically, this rule applies where a number of cattle are all on the same open range, and all rounded up at the same time, and loaded onto a truck at the same time from the same loading pen. *Hearn* v. *State, supra.*

In this case, petitioner was charged in a single information with stealing on July 7, 1945, a total of five cattle belonging to a Mrs. Bronson (R. 9-10). The information, however, was divided into three separate counts, one charging the theft of two steers, the second charging the theft of two cows, and the third charging the theft of one heifer. Nowhere in the information is the time of these separately charged thefts alleged with any more specificity than "on the 7th day of July, 1945". Nowhere is the place of the crime described in any more detail than "in the County and State aforesaid."

The evidence produced by the State at the trial in support of these charges showed without dispute that all five of the cattle were stolen at the same time, from the same place, under the same circumstances, and with the same intent (R. 3, 4, 16, 21).

It is submitted that under these circumstances, petitioner could lawfully have been convicted and punished for only one offense. While three offenses were properly charged, only one offense was shown by the undisputed evidence.

As stated by The Florida Supreme Court in ruling on a similar situation:

> "The difficulty does not result from the joinder of the counts in the information, but arises from the evidence." Bargesser v. State (1928), Bargesser v. State, 95 Fla. 404, 116 So. 12, 13.

In that case, a defendant had been charged by an information containing two counts with the two offenses of stealing one Ford coupe and receiving and concealing one Ford coupe, knowing it was stolen. The jury returned a general verdict of guilty as charged and the defendant was convicted of both offenses, albeit the evidence showed he had received and concealed only the same Ford coupe he had stolen. On appeal, the Florida Supreme Court held that the petitioner could not in law be guilty of both offenses and since the jury's verdict was unintelligible, the judgment was reversed.

In the case at Bar, however, the petitioner was not only convicted on all three counts, but he was sentenced to serve consecutive five year sentences on each conviction (R. 12-13).

What has been said above concerning the information charging three offenses on July 7, 1945, applies with equal force to the second information involved in this case charging three offenses of cattle stealing on July 29, 1945, from William C. Zipperer (R. 10-11). There, too, the evidence showed without dispute that the one cow and two heifers described in the three counts were all stolen at the same time, from the same place, under the same circumstances and with the same intent (R. 4, 14, 22). There, too, petitioner was convicted of three offenses and sentenced to serve three five year sentences, consecutive to each other and to the sentences imposed on the other information (13-14).

In short, petitioner was convicted and sentenced six times for two offenses.

B. *The Maximum Total Sentence Prescribed by Law for the Two Offenses Upon Which Petitioner Could Properly Have Been Convicted Is Ten Years in Prison.*

As is shown above, petitioner could have lawfully been convicted of only two offenses of cattle stealing, one for the cattle stolen on July 7, 1945, and one for the cattle stolen on July 29, 1945. Section 811.11, F. S. '53 (Section 811.11, F.S. '41) provides that the punishment for such a crime shall be "by imprisonment in the state prison not less than two nor more than five years." Appendix, p. 33.

Accordingly, it must follow that the maximum penalty which could have been imposed upon petitioner was five years' imprisonment for each offense, for a total of ten years—which term he has already more than served—unless it can be shown that he could lawfully have been punished under the terms of Section 811.12, F.S. '53 (Section 811.12, F.S. '41), which provides for a maximum penalty of twenty years imprisonment upon a second conviction of horse or cattle stealing. Appendix, p. 35.

It is submitted that since neither of the informations in this case alleged or purported to charge petitioner as a second offender, petitioner could not lawfully be punished pursuant to the terms of Section 811.12, F.S. '53 (Section 811.12, F. S. '41). While the Supreme Court of Florida has never construed Section 811.12, F.S. '53, in this situation, it has repeatedly ruled concerning other "second offender" statutes that:

> "It is the general rule that on a charge of a 'second of subsequent' offense, the question of a prior conviction is an essential element of the offense charged, and is an issue of fact to be determined by a jury." *Spark-*

*man* v. *State Prison Custodian* (1944) 154 Fla. 688, 18 So. 2d, 772, 774.

See also *State* v. *Davidson* (1931), 103 Fla. 954, 139 So. 177; *State ex rel. Stoutamire* v. *Mayo* (1937), 128 Fla. 843, 175 So. So. 808, 810; *State* v. *Mayo* (1924), 88 Fla. 96, 101 So. 228, 230; *Pridgeon* v. *State* (1914), 68 Fla. 98, 66 So. 564.

Accordingly, petitioner not having been charged or convicted as a second offender can not be sentenced or punished as one. Cases cited supra. The maximum total sentence he was subject to under the law of Florida from the two offenses was ten years in prison.

C. *The Due Process Clause of the 14th Amendment Forbids a State from Punishing an Accused More Than Once for the Same Offense.*

Eighty-two years ago this Court, through Mr. Justice Miller, stated one of those rare principles which rings as true and applies as universally in this century as it did the day it was rendered:

> "If there is anything settled in the jurisprudence of England and America, it is that no man can be twice punished for the same offense."
>
> Ex parte Lange (1874), 18 Wall. 163, 168.

The very idea of the same sovereignty, with calculated deliberation, subjecting an accused to repeated punishments for the same offense is indeed one which outrages even the very sternest sense of Justice. This feeling of basic fairness must stem far back, deep into mankind's history for even that ancient code expressed in the Old Testament of the Bible, promulgated thousands of years ago, exacted only one eye for an eye and one tooth for

a tooth. Yet the feeling flows as strongly today as ever for as recently stated by this Court just a few short years ago:

> "Our minds rebel against permitting the same sovereignty to punish an accused twice for the same offense."
>
> *Louisiana* v. *Resweber* (1947), 329 U.S. 459, 462.

So inborn and widely accepted has been this feeling that happily the spectacle of double punishment has seldom come before the Bar of this Court, and usually then only in its milder, accidental or unintentional form. And in those cases, strangely enough, it has usually been the Federal Government which was involved. Indeed, petitioner knows of no case where a state of this Nation has ever urged upon this Court that it had the right, or, indeed, desired the power to punish deliberately its citizens twice or more times for the same offense. No state can conceivably have any legitimate interest in possessing such a dangerous power, suitable only for oppressive misuse.

It is highly appropriate that Justice Louis D. Brandeis, described by Chief Justice Stone as having a "passion for freedom and justice for all men," was among the first of counsel to urge upon this Court that a State may not impose a second punishment upon an accused for the same offense. *Murphy* v. *Massachusetts* (1900), 177 U.S. 155, 44 L. Ed. 711, 712. Contending that a sentence which puts a person a second time in jeopardy for the same offense deprives him of liberty without due process of law, counsel in that case argued that Massachusetts had no power to resentence according to law one who originally had been improperly sentenced and had succeeded in having that original sentence set aside on appeal. This

Court held that the mere correction of an improper sentence did not disturb fundamental principles of right, but took care to emphasize that:

> "We repeat that this is not a case in which the court undertook to impose *in invitum* a second or additional sentence for the same offense, or to substitute one sentence for another. On the contrary, plaintiff in error availed himself of his right to have the first sentence annulled so that another sentence might be rendered."
>
> 177 U.S. at p. 160.

Thereafter in *Palko* v. *Connecticut* (1937), 302 U.S. 319, a petitioner urged that a state lacked power by virtue of the 14th Amendment to place him even in double jeopardy of being punished for a single offense. In this case the specific claim was that a State could not provide for appeals by the prosecution to correct substantial legal errors in the trials of criminal cases. And again this Court held that fundamental principles of liberty and justice were not violated by such action, but likewise took care to make quite clear that:

> "What the answer would be if the state were permitted after a trial free from error to try the accused over again or to bring another case against him we have no occasion to consider."
>
> 302 U.S. at p. 328.

While the *Palko* case involved the problem of double jeopardy or trials as distinguished from double punishment, the two are certainly not unrelated in their nature, and of the two, double punishment is clearly the more odius. As vividly stated by this Court in *Ex parte Lange*, (1874), 18 Wall. 163, 178:

"For of what avail is the constitutional protection against more than one trial if there can be any number of sentences pronounced on the same verdict? Why is it that, having once been tried and found guilty, he can never be tried again for that offense? Manifestly it is not the danger or jeopardy of being a second time found guilty. It is the punishment that would legally follow the second conviction which is the real danger guarded against by the Constitution. But if, after judgment has been rendered on the conviction, and the sentence of that judgment executed on the criminal, he can be again sentenced on that conviction to another and different punishment, or to endure the same punishment, a second time, is the constitutional restriction of any value? Is not its intent and its spirit in such a case as much violated as if a new trial had been had and, on a second conviction, a second punishment inflicted?

"The argument seems to us irresistible and we do not doubt that the Constitution was designed as much to prevent the criminal from being twice punished for the same offense as from being twice tried for it."

Such language still vibrates with the full vigor of its obvious conviction. And following its persuasiveness, this Court has on at least two later occasions stated or ruled that the double jeopardy clause of the 5th Amendment forbids as much a second punishment as a second trial for the same offense. *United States* v. *Chouteau* (1881), 102 U.S. 603; *United States* v. *Benz* (1931), 282 U.S. 304.

On the other hand, without mention of these prior decisions or citation of any authority and, it is respectfully submitted, only by way of *dicta* (since the petitioner there had not yet served a valid, unchallenged prior sentence) this Court ruled in *Holiday* v. *Johnston* (1941), 313 U.S.

342, 349, a case arising on habeas corpus, that the erroneous imposition of two sentences for a single offense, while illegal, does not constitute double jeopardy or violate the 5th Amendment's double jeopardy clause. Since that decision, the Court has not resolved the apparent conflict where the question of double punishment under Federal authority has arisen, merely holding such punishment erroneous without reaching the Constitutional question. *Re Bradley* (1943), 318 U.S. 50; *Braverman* v. *United States* (1942), 317 U.S. 49; See *Bozza* v. *United States* (1947), 330 U.S. 160; *Helvering* v. *Mitchell* (1938), 303 U.S. 391, 399; *Rex Trailer Co.* v. *United States* (1956), — U.S. —, 100 L. Ed. (advance pp. 160, 162).

But regardless of whether double punishment be considered in violation of the 5th Amendment's double jeopardy prohibition, it is clear that this Court has struck out vigorously against such governmental action by the same sovereignty wherever it has been intentionally and deliberately imposed for a single offense, whether the ground be Constitutional, statutory, or in the exercise of this Court's supervisory power over Federal criminal procedure. *Ex Parte Lange* (1874), 18 Wall. 163, 168; *United States* v. *Chouteau* (1881), 102 U.S. 603; *United States* v. *Benz* (1931), 282 U.S. 304; *Holiday* v. *Johnson*, (1941), 313 U.S. 342; *Braverman* v. *United States* (1942), 317 U.S. 49; *Re Bradley* (1943), 318 U.S. 50.

So, also, while the question has not heretofore been squarely presented in a case involving a state, the Court has been scrupulously careful not to sanction as in conformity with Due Process under the 14th Amendment any state action bordering on intentional, separate, multiple punishments or prosecutions for a single offense. *Murphy* v. *Massachusetts* (1900), 177 U.S. 155, 160; *Palko* v. *Connecticut* (1937), 302 U.S. 319, 328.

Indeed, two recent cases, it is submitted, have indicated the very extreme limit or brink of state action in this connection. In *Louisiana* v. *Resweber* (1947), 329 U.S. 459, a sharply divided court sustained a state's power to carry out its lawfully imposed death penalty despite the accidental failure of a prior attempt (due, perhaps, to the state's negligence). Admittedly no question of an intentional, deliberate imposition of a second punishment was presented.

Similarly, in *Brock* v. *North Carolina* (1953), 344 U.S. 424, a divided court ruled that a state judge may properly be invested with a discretion, to be exercised only on substantial grounds, to declare a mistrial in a criminal proceeding over the defendant's objection and proceed again to trial of the case.

Neither decision, it is submitted can possibly be interpreted as sanctioning Florida's action in this case of deliberately, on the admitted facts, subjecting petitioner for a single offense to serve three separate prison sentences, each for the maximum term imposed by statute for the offense. Such action is so fundamentally contrary both to the spirit of the 5th Amendment's prohibition against double jeopardy and to the basic concepts of fairness and justice that it must be in violation of the Due Process Clause of the 14th Amendment to the Constitution of the United States.

D. *The Prohibition of the 8th Amendment against cruel and unusual punishments, as applied to state action by the Due Process Clause of the 14th Amendment, forbids such punishment as Florida has inflicted in this case.*

In *O'Neil* v. *Vermont* (1892), 144 U.S. 323, this Court reviewed the action of the State of Vermont in sentencing

a man to over 54 years of imprisonment upon his conviction of 307 petty offenses of selling intoxicating liquors contrary to the law of Vermont. Since the petitioner in that case, however, neglected to assign as error or argue in his brief that Vermont's action subjected him to cruel and unusual punishment in violation of the 8th Amendment, the Court stated it would forbear ruling upon the question except to note that it had previously been ruled that the 8th Amendment does not apply to the states. A significant passage from the Vermont Supreme Court's ruling on the matter was nevertheless quoted, including the following:

> "'If the penalty was unreasonably severe for a *single* offense, the constitutional question might be urged; but here the unreasonableness is only in the number of offenses which the respondent has committed.'"

144 U.S. 323, 331.

The situation posed by the Vermont Supreme Court is exactly that presented in this case. Here, a 53 year-old man with no past criminal record has been sentenced to what must be virtually a life sentence of 30 years in prison for stealing eight cattle. For the view that such a punishment for such an offense offends the 8th Amendment's inhibition against cruel and unusual punishments, as applied to State action by the 14th Amendment, petitioner respectfully commends to this Court's attention the dissent of Mr. Justice Field, concurred in by Mr. Justice Harlan and Mr. Justice Brewer, in the O'Neal case, 144 U.S. 323, 337, 362-367. See also the dissent of *Circuit Judge Thurston in United States* v. *Beerman* (Dist. Col. 1838), 5 Cranch CC 412, Fed. Case No. 14560.

### E. *Denial of Equal Protection.*

Petitioner did not assert a denial of equal protection contrary to the Equal Protection Clause of the 14th Amendment in the Court below, and therefore that question has not been ruled upon by the Florida courts, and petitioner submits might still be asserted, if necessary, in a subsequent habeas corpus proceeding. Nevertheless, the denial of equal treatment by a State to its citizens has relevency to the reasonableness of State action under the Due Process Clause. Accordingly, petitioner submits that by imposing a different and higher punishment on him than is imposed on all others for like offenses, Florida in this case has violated the Due Process Clause of the 14th Amendment. See *Ex Parte Converse* (1891), 137 U.S. 624; *Skinner* v. *Oklahoma* (1942), 316 U.S. 535; *Dowd* v. *United States* (1951), 340 U.S. 206.

## III. DUE PROCESS OF LAW COMMANDS THAT A STATE AT LEAST ESTABLISH SOME STANDARD OF PROOF, HOWEVER HIGH, AND AT LEAST PROVIDE SOME REMEDY, HOWEVER MEAGRE, WHEREBY AN INNOCENT MAN CONVICTED EXCLUSIVELY ON THE BASIS OF ADMITTEDLY PERJURED TESTIMONY CAN FREE HIMSELF FROM A TERM OF IMPRISONMENT UNJUSTLY IMPOSED

Nothing is quite so demoralizing as the spectacle of the law working an injustice, and when that injustice involves the conviction and imprisonment for 30 years of a 53 year-old man, absolutely innocent of any crime, it is difficult, to say the least, to fully understand Justice Cardozo's famous phrase that "Law *Is* Justice." It is not the realization that innocent people may wrongfully be convicted which is so shocking. Courts and juries being composed of human beings, it would be naive indeed to expect infallibility at their hands, and especially so when two depraved criminals deliberately and with calculated forethought set

out to falsely implicate an innocent man. Error in such a case, regretably, must be expected.

The shocking thing is the attitude of the Law toward one in such a predicament. All hope is denied him. There is no legal remedy. The perjurors can blatantly boast or contritely admit their revolting action in causing an innocent man to be wrongfully convicted. The Law remains deaf and decrees that the innocent convicted must serve out his "lawfully" imposed sentence.

However acceptable such a situation may be to present-day judicial palates, petitioner submits that the overwhelming majority of American laymen would be alarmed and revolted at such a concept.

What is it that petitioner seeks in this case? It is not so much. He merely asks an opportunity to show, beyond a reasonable doubt if necessary, that he was convicted solely on the basis of the false testimony of two ex-employees and co-defendants, both of whom freely and voluntarily, and without prompting by petitioner, admitted within six months after petitioner's trial that they had given untrue testimony against petitioner and that he was wholly innocent of the crimes with which they had charged him and convicted him. If petitioner can make such a showing—beyond a reasonable doubt—he asks that he be relieved from serving the remainder of his prison term. Is this too great a favor for an innocent man to ask of society in this day and age? Is this too much for Due Process of Law in the United States of America to afford a lowly convict?

## Conclusion

Over 700 years ago in a meadow called Runnymede, between Windsor and Staines, a group of Englishmen received from their Sovereign a solemn promise:

> "If any one has been dispossessed or deprived by us, without the legal judgment of his peers, of his lands,

castles, liberties, or right, we will forthwith restore them to him; * * *"

Magna Charta, 25 Fla. Stat. Anno., p. 7.

This promise was made "* * * to all the freemen of our kingdom for us and for our heirs for ever * * to be had and holden by them and their heirs, of us and our heirs for ever * *."

Petitioner asks only that the full spirit of this solemn promise be kept.

Respectfully submitted,

NEAL P. RUTLEDGE,
*Counsel for Petitioner.*

February 20, 1956.

## APPENDIX

*Constitutional Provisions and Statutes Involved*

Section 1, Fourteenth Amendment, Constitution of the United States, Volume 1, United States Code 1952 ed., pp. XLV-XLVI:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the States wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Fifth Amendment, Constitution of the United States, Volume I, United States Code 1952 ed., p. XLIV:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor to be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Eighth Amendment, Constitution of the United States, Volume I, United States Code, 1952 ed., p. XLV:

> "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

Section 811.11, Chapter 811, Title XLIV, Volume II, p. 2669, The Official Florida Statutes 1953: 22 F.S.A. § 811.11:

"811.11 *Horse or cattle stealing.*—Whoever commits larceny by stealing any horse, mule, mare, filly, colt, cow, bull, ox, steer, heifer or calf, the property of another, shall be punished by imprisonment in the state prison not less than two years nor more than five years."

Section 811.12, Chapter 811, Title XLIV, Volume II, p. 2669, The Official Florida Statutes 1953: 22 F.S.A. § 811.12:

"811.12 *Second conviction of horse or cattle stealing.*—Whoever violates the provisions of § 811.11 a second time, and is convicted of such second separate offense, either at the same term or a subsequent term of court, shall be punished by imprisonment in the state prison not less than five years nor more than twenty years."

Section 954.06, Chapter 954, Title XLVI, Volume II, pp. 2851-2852, The Official Florida Statutes, 1953; 24 F.S.A. § 954.06.

"954.06 *Gain time for good conduct.*—

"(1) The commissioner of agriculture shall keep a record of the conduct of each prisoner. Commutation of time for good conduct shall be granted by the board of commissioners of state institutions, or in case of those prisoners known as county prisoners, by the board of county commissioners, and the following deductions shall be made from the term of sentence when no charge of misconduct has been sustained against a prisoner, viz.: Five days per month off the first and second years of the sentence; ten days per month off the third and fourth years of the sentence; fifteen days

per month off the fifth and all succeeding years of the sentence. Where no charge of misconduct is sustained against a prisoner, the deduction shall be deemed earned and the prisoners shall be entitled to credit for a month as soon as the prisoner has served such time, as, when added to the deduction allowable, will equal a month. A prisoner under two or more cumulative sentences shall be allowed commutation as if they were all one sentence.

"(2) For each sustained charge of escape or attempted escape, mutinous conduct or other serious misconduct, all the commutation which shall have accrued in favor of the prisoner up to that day shall be forfeited, except that in case of escape if the prisoner voluntarily returns without expense to the state, then such forfeiture may be set aside by the board of commissioners of state institutions if in their judgment his subsequent conduct entitles him thereto. Whenever a conditional pardon granted to a prisoner by the board of pardons of the State of Florida is revoked and such prisoner ordered by said board to be returned to prison or jail, such prisoner shall be deemed to forfeit all gain time or commutation of time for good conduct, earned up to the time of his release under such conditional pardon.

"(3) Prisoners sentenced for life imprisonment who have actually served ten years and have sustained no charges of misconduct and have a good prison record, shall be recommended by the commissioner of agriculture for a reasonable commutation of sentence, and if same be granted, commuting the life sentence to a term of years, then such convict shall have the benefit of the ordinary commutation, as if originally sentenced for a term of years, unless it shall be otherwise ordered by the board of pardons."

Section 954.06, Chapter 954, Title XLVI, Volume I Official Revised Florida Statutes 1941:

"954.06 *Gain time for good conduct.*—The Commissioner of Agriculture shall keep a record of the conduct of each prisoner. Commutation of time for good conduct shall be granted by the board of commissioners of state institutions, or in case of those prisoners known as county prisoners, by the board of county commissioners, and the following deductions shall be made from the term of sentence when no charge of misconduct has been sustained against a prisoner, viz.: Five days per month off the first and second years of the sentence; ten days per month off the third and fourth years of the sentence; fifteen days per month off the fifth and all succeeding years of the sentence. A prisoner under two or more cumulative sentences shall be allowed commutation as if they were all one sentence.

"For each sustained charge of escape or attempted escape, mutinous conduct or other serious misconduct, all the commutation which shall have accrued in favor of the prisoner up to that day shall be forfeited, except that in case of escape if the prisoner voluntarily returns without expense to the state, then such forfeiture may be set aside by the board of commissioners of state institutions if in their judgment his subsequent conduct entitles him thereto.

"Prisoners sentenced for life imprisonment who have actually served ten years and have sustained no charges of misconduct and have a good prison record, shall be recommended by the commissioner of agriculture for a reasonable commutation of sentence, and if same be granted, commuting life sentence to a term of years, the such convict shall have the benefit of the ordinary commutation, as if originally sentenced for

a term of years, unless it shall be otherwise ordered by the board of pardons."

Section 79.10, Chapter 79, Habeas Corpus, Title VI, Volume I, p. 334, The Official Florida Statutes 1953; 6 F.S.A. § 79.10:

"79.10 *Effect of judgment.*—The judgment so entered of record shall be conclusive until reversed in the manner hereinafter provided for, and no person remanded by such judgment while the same continues in force shall be at liberty to obtain another habeas corpus for the same cause, or by any other proceeding to bring the same matter again in question except by writ of error or by action of false imprisonment; nor shall any person who shall be discharged from confinement by such judgment be afterward confined or imprisoned for the same cause, unless by order or judgment of a court of competent jurisdiction."

# SUPREME COURT OF THE UNITED STATES

## OCTOBER TERM, 1955

## No. 489

DAN DURLEY,
PETITIONER,

vs.

NATHAN MAYO, Custodian,
Florida State Prison,
RESPONDENT.

## ON WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

## BRIEF FOR RESPONDENT

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STATUTES AND CONSTITUTIONAL PROVISIONS



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# BRIEF FOR RESPONDENT

## JURISDICTION

This Court has no jurisdiction because, as will be more fully pointed out in our argument of Question One, post, there were two state grounds adequate to sustain the judgment of the Supreme Court of Florida and the decision of that Court might have been, and probably was, on one or both of said state grounds.

## QUESTIONS PRESENTED

We state as follows the three questions presented:

### QUESTION ONE

WHERE THE STATE SUPREME COURT JUDICIALLY KNEW THAT THE FEDERAL CLAIMS PRESENTED BY THE CURRENT PETITION FOR WRIT OF HABEAS CORPUS HAD BEEN PRESENTED AND/OR THAT THE PETITIONER HAD HAD A FAIR AND ADEQUATE OPPORTUNITY TO PRESENT THEM IN TWO PREVIOUS HABEAS CORPUS CASES, IN ONE OF WHICH THE PETITIONER DREW HIS OWN PETITION, WHICH WAS DENIED, AND IN THE OTHER OF WHICH THE PETITION WAS DRAWN BY COUNSEL AND THE WRIT WHICH WAS ISSUED WAS LATER QUASHED AFTER ARGUMENT, AND WHERE TWO ADEQUATE STATE GROUNDS EXISTED FOR DENYING THE CURRENT PETITION, VIZ., (1) UNDER THE STATE STATUTE AND THE RULINGS OF THE STATE SUPREME COURT HABEAS CORPUS DECISIONS ARE RES JUDICATA, AND (2) UNDER THE DECISIONS OF SAID COURT A PRISONER WILL NOT BE HEARD TO RAISE IN A SUBSEQUENT HABEAS CORPUS PROCEEDING ISSUES THAT HE HAD A FAIR AND ADEQUATE OPPORTUNITY TO RAISE AND HAVE DETERMINED IN AN EARLIER PROCEEDING, AND WHERE THE ORDER DENYING THE CURRENT PETITION DID NOT STATE THE GROUNDS UPON WHICH THE DENIAL WAS BASED BUT IT MIGHT HAVE BEEN, AND PROBABLY WAS, BASED ON ONE OR BOTH OF SAID ADEQUATE STATE GROUNDS, DOES THIS COURT HAVE JURISDICTION TO REVIEW SAID DENIAL?

## QUESTION TWO

WHERE, UNDER THE STATE PRACTICE, IT IS PERMISSIBLE IN PROPER CASES TO CONVICT AN ACCUSED AND IMPOSE A SEPARATE SENTENCE UPON HIM FOR EACH OF TWO OR MORE OFFENSES CHARGED IN SEPARATE COUNTS OF ONE INFORMATION AND TO REQUIRE THAT SUCH SENTENCES BE SERVED CONSECUTIVELY, AND WHERE THE RECORD SHOWS THAT THE TRIAL COURT *ADJUDGED THE PETITIONER GUILTY OF THE OFFENSE CHARGED IN EACH OF TWO* THREE-COUNT INFORMATIONS AND IMPOSED A *SEPARATE SENTENCE FOR THE OFFENSE CHARGED IN THE FIRST COUNT* OF EACH INFORMATION; *FOR THE OFFENSE CHARGED IN THE SECOND COUNT* OF EACH INFORMATION, *AND FOR THE OFFENSE CHARGED IN THE THIRD COUNT* OF EACH INFORMATION, DOES THIS RECORD SHOW THAT THERE WERE SIX SEPARATE OFFENSES AND PRECLUDE THE CLAIM THAT THERE WERE ONLY TWO?

## QUESTION THREE

WHERE IN HIS PETITION FOR HABEAS CORPUS THE PETITIONER MADE AN INSUBSTANTIAL AND INCONCLUSIVE SHOWING THAT HIS CONVICTIONS WERE BASED ON PERJURED TESTIMONY, AND WHERE THERE WAS NO CLAIM THAT THE STATE OR ANY OF ITS FUNCTIONARIES KNOWINGLY USED PERJURED TESTIMONY TO OBTAIN SUCH CONVICTIONS, DOES THE DUE PROCESS CLAUSE OF THE 14TH AMENDMENT TO THE UNITED STATES CONSTITUTION ENTITLE THE PETITIONER TO A WRIT OF HABEAS CORPUS?

## STATEMENT OF THE CASE

In 1945, a three-count information was filed against the petitioner in the Criminal Court of Record of Polk County, Florida (R. 9-10). Each count charged the larceny of cattle from the same owner on the same day.

Also, in 1945 another three-count information was filed against the petitioner in said court (R. 10-11). Each count charged the larceny of cattle from the same owner on the same day.

In one of these cases (No. 4179) the trial court adjudged the petitioner *guilty "of the offense charged in each count of the information in this cause"*, and sentenced him as follows (R. 13-14):

(1) Five years, "*for* your said *offense charged in the first count* of the information."

(2) Five years, "*for* your said *offense charged in the second count* of the information," "*to begin at the expiration of the sentence pronounced upon you for the offense charged in the first count of the information.*"

(3) Five years, "*for* your said *offense charged in the third count* of the information," "*to begin at the expiration of the sentence imposed upon you for the offense charged in the second count of the information.*"

In the other case (No. 4172) the trial court adjudged the petitioner "*guilty of the crime of stealing cattle as charged in each count of the information in this cause,*" and sentenced him as follows (R. 12-13):

(1) Five years, "*for* your said *offense charged in the first count* of the information," "to begin at

the expiration of the sentence pronounced upon you for the offense charged in the third count of the information in case No. 4179."

(2) Five years, "*for the offense charged in the second count* of the information in this cause," "*to begin at the expiration of the sentence imposed upon you for the offense charged in the first count of the information in this cause.*"

(3) Five years, "*for* the *offense charged in the third count* of the information in this cause," "*to begin at the expiration of the sentence imposed upon you for the offense charged in the second count of the information in this cause.*"

On May 9, 1949, the petitioner, not represented by counsel, filed in the Supreme Court of Florida his petition for writ of habeas corpus in which, among other things, he said: "Petitioner alleges that he * * * is falsely imprisoned by reason that *verdict of guilt was wholly supported by prejudge and perjured testimony.*" (R. 33.)

To said 1949 petition the petitioner attached the same affidavits of J. E. Croft (purporting to recount statements made to him by the petitioner's codefendant Charles Bath), R. B. Massey, Jr., (the other codefendant in the original prosecutions) and L. L. Bembry, (R. 35-37), which were attached to the 1955 petition for habeas corpus (R. 15-18), the denial of which is now before this Court for review.

The Supreme Court of Florida denied said 1949 petition on May 9, 1949. (R. 38).

On January 30, 1952, the petitioner, represented by counsel, filed in the Circuit Court of the Eighth Judicial Circuit in and for Union County, Florida, his petition

for writ of habeas corpus to which were attached as exhibits copies of the two informations and of the judgments and sentences above mentioned (R. 41). (The brief of counsel for the petitioner says that this petition was filed "with the aid of court-appointed counsel". We find nothing in the record to support the statement; anyway, the petitioner is not entitled to extract any advantage from the manner in which he acquired his 1952 attorney.) Said petition alleged in part as follows (R. 38-40):

"One

"That on or about the 19th day of October, A.D. 1945, your petitioner was convicted in the Criminal Court of Record, in and for Polk County, Florida, upon two Informations, each containing what purports to be three (3) separate counts, charging 'Stealing Cattle,' and sentenced therefore to a term of what purports to be five (5) years for each of said counts, in each of the said Informations, and aggregating into a thirty (30) year sentence. A copy of each of the said informations is attached hereto and made a part hereof, as is a copy of each of the said sentences, which are attached hereto and made a part hereof.

"Two

"That each of the said 'counts' in the aforesaid Informations [fol. 55] charge the one and same crime that is charged by the other 'counts' within the same Information; and each of the said 'counts' does merely separate the goods which were the subject of the larceny; and that the said 'counts' are not merely alternative or disjunctive, but do in fact charge the one and same crime.

"Three

"That the third 'count' in the Information in case No. 4179 does repeat and reiterate verbatim that

which is set out in the second 'count' therein; and that both of the aforesaid 'counts' do but repeat that same thing that is set out in the first 'count' therein, and with specificity.

"Four

"That the maximum penalty, by way of imprisonment, for the crime of 'Stealing Cattle' is five (5) years imprisonment in the State Prison.

"Five

"That the two Informations aforesaid, do make out but two crimes of 'Cattle Stealing,' and that the maximum sentence which could be meted out therefor is two five (5) year sentences to the State Prison; and that the sentences could be made consecutive, thereby making a maximum imprisonment therefor a period of ten (10) years.

"Six

"That your petitioner has already served, by virtue of the sentences resulting from the aforesaid Informations, in the State Prison, a term of years, which combined with accrued gain time, is greater than the time necessary to satisfy a ten-year sentence in the State Prison.

"Seven

"That there are no other sentences outstanding by virtue [fol. 56] of which your petitioner could at this time be imprisoned and detained.

"*Therefore, petitioner* would show unto the Court that he *is detained* and *imprisoned by the respondent herein*, against his will and *in direct violation of his rights as set out in the Constitution of the United States*, and the Constitution of the State of Florida, and contrary to the laws of the State of Florida." (Emphasis supplied.)

On January 31, 1952, upon the basis of said petition, the said Circuit Court issued its writ of habeas corpus, directed to the respondent in said cause, who is also the respondent in the case at bar (R. 41-42).

On February 7, 1952, the respondent filed his return to said writ of habeas corpus, in which return he alleged in part as follows (R. 43-44):

"2

"He denies the allegations of paragraph Two of the petition herein, and each of them severally. He denies that any count of either of said informations charges the same larceny as is charged in the other counts of the same information, or either of them. He denies that the larceny charged any count of either of said informations was committed at the same time and place and under the same circumstances as the larceny charged in the other counts of the same information, or either of them.

"3

"He admits that counts 2 and 3 of the information in case #4179 (which information charged the larceny of animals belonging to William C. Zipperer) are couched in similar verbiage, but he denies that the larceny of heifer charged in the third count is the same larceny as the larceny of [fol. 68] heifer charged in the second count. He denies the petitioner's allegations that the second and third counts 'do but repeat that same thing that is set out in the first "count" therein, and with specificity.'

"4

"He admits the allegations of paragraph Four of the petition.

"5

"He denies that the said two informations made out only two crimes of cattle stealing, and he says

that each count of each of said informations charged a separate, distinct larceny of cattle. He denies that the maximum sentence which could be meted out under each information was five years, and says that it was lawful to impose a five-year sentence under each count of each information, and to prescribe that they run consecutively.

"6

"He admits the allegations of paragraphs Six and Seven of the petition.

"7

under and by virtue of said sentences, but he denies that said custody is unlawful."

"He admits that he holds the petitioner in custody

On February 7, 1952, the said Circuit Court entered its order quashing said writ and remanding the petitioner to the custody of the respondent, which order recited that the cause came on to be heard upon a writ of habeas corpus and respondent's return thereto and that argument for the respective parties had been heard (R. 42).

The petitioner appealed from said Circuit Court order to the Supreme Court of Florida (R. 44-45) and his appeal was dismissed by said Supreme Court upon the motion of counsel for the appellee (R. 45).

On February 10, 1955, the petitioner filed in the Supreme Court of Florida a petition for writ of habeas corpus, the denial of which is now under review, to which petition were attached copies of the above mentioned informations, judgments and sentences, and affidavits, and also a copy of an affidavit made by Jack K. Rouse and Duaine A. Rouse (R. 1-18). In said petition he claimed that only two offenses were involved instead of six, that he had served enough time to complete sen-

tences for two of the offenses, and that he was being subjected to triple punishment for each offense; also, that his convictions were based solely on perjured testimony. He alleged that his imprisonment was an abuse of the due process clause of the 14th Amendment to the Constitution of the United States of America.

On February 22, 1955, said petition was denied without opinion. The order of denial recited that "the Petitioner has failed to show as a condition precedent probable cause to believe that he is detained in custody without lawful authority" (R. 20).

The brief filed in this Court by counsel for the petitioner (P. 9) states that "petitioner is nevertheless prepared to show that Judge Murphree (who was the judge who presided over the above mentioned 1952 habeas corpus case) * * * was persuaded by the argument of the respondent's counsel that the prior dismissal of petitioner's previous petition for writ of habeas corpus by the Florida Supreme Court on May 9, 1949, had settled petitioner's contentions adversely to him and barred their assertion in the Circuit Court (see pp. 1-2 of petitioner's brief in reply to respondent's brief in opposition to petition for certiorari filed with this Court September 6, 1955)". (Parenthetical matter supplied.)

We answer that (1) this allegation is not based upon the facts; (2) even if the allegation were true, it would not affect the fact that Judge Murphree's order quashing the writ of habeas corpus and remanding the petitioner to custody is res judicata under Florida law; and (3) even if said allegation were true, it was not before the Supreme Court of Florida in the petition which is now here for review and this Court should not weigh the ruling of that Court upon the basis of a matter which was not before it for consideration.

## SUMMARY OF ARGUMENT

### ONE

This Court has no jurisdiction where the decision of the state court might have been based on an adequate state ground.

The state court judicially knew that the petitioner's 1949 and 1952 petitions for habeas corpus sufficiently raised the federal questions presented by the 1955 petition, and the state rule of res judicata prevented further consideration of those claims and was an adequate state ground for denying the 1955 petition. The order denying the 1955 petition did not state the ground upon which the denial was based and it might have been, and probably was, based upon said adequate state ground.

There was another adequate state ground upon which the denial of the 1955 petition might have been, and probably was, based, viz., the state court judicially knew that the petitioner had had a fair and adequate opportunity to present in his 1949 and 1952 petitions, and to have determined, the federal questions raised in his 1955 petition and therefore under the state rule he could not be heard to raise those questions in his 1955 petition.

### TWO

The records of the trial court, which were judicially known to the Supreme Court of Florida, show that the petitioner was convicted and sentenced for six separate offenses, and those records cannot be contradicted.

Even if this were not so, the erroneous imposition of two sentences for a single offense is not double jeopardy.

There is no merit in the petitioner's contention that the imposition upon him of sentences totaling 30 years constituted cruel and unusual punishment of the type forbidden by the 8th Amendment and that the due process clause of the 14th Amendment applies the 8th Amendment's cruel and unusual punishment clause to state action.

There is likewise no merit in the petitioner's contention that the equal protection clause of the 14th Amendment has been violated and that by violating said clause the Florida courts have violated the due process clause of said amendment.

## THREE

The due process clause of the 14th Amendment does not apply to any action except state action. It does not apply where, as here, the alleged perjured testimony was not knowingly used by the state or any of its officers or agents. Moreover, even if the reverse were true, the petitioner's showing that perjured testimony was used was too insubstantial and inconclusive to require the issuance of a writ of habeas corpus.

## ARGUMENT

## ONE

THE DECISION OF THE STATE COURT IN DENYING THE PETITIONER'S APPLICATION FOR WRIT OF HABEAS CORPUS MIGHT HAVE BEEN, AND PROBABLY WAS, BASED UPON STATE GROUNDS ADEQUATE TO SUSTAIN THE DECISION.

As this Court said in *Williams v. Kaiser, 323 U. S. 471, 477:*

"And where the decision of the state court *might* have been either on a state ground or on a federal ground and the state ground is sufficient to sustain the judgment, the Court will not undertake to review it. Klinger v. Missouri, 13 Wall. (US) 257, 263, 20 L ed 635, 637; Walter A. Wood Mowing & Reaping Mach. Co. v. Skinner, 139 US 293, 297, 35 L ed 193, 195, 11 S Ct 528; Allen v. Arguimbau, 198 US 149, 154, 155, 49 L ed 990, 993, 25 S Ct 622; Lynch v. New York, 293 US 52, 79 L ed 191, 55 S Ct 16, supra." (Emphasis supplied.)

The same sort of pronouncement was made in *Stembridge v. Georgia, 343 U. S. 541, 547,* in which case this Court also said:

"Where the highest court of the state delivers no opinion and it appears that the judgment might have rested upon a nonfederal ground, this Court will not take jurisdiction to review the judgment. Hedgebeth v. North Carolina, 334 US 806, 92 L ed 1739, 68 S Ct 1185; Woods v. Nierstheimer, 328 US 211, 90 L ed 1177, 66 S Ct 996; White v. Ragen, 324 US 760, 89 L ed 1348, 65 S Ct 978; McGoldrick v. Gulf Oil Corp., 309 US 2, 84 L ed 537, 60 S Ct 375; Woolsey v. Best, 299 US 1, 81 L ed 3, 57 S Ct 2; Lynch v. New York, 293 US 52, 79 L ed 191, 55 S Ct 16; Cuyahoga River Power Co. v. Northern Realty Co., 244 US 300, 303, 304, 61 L ed 1153, 1157, 1158, 37 S Ct 643; Adams v. Russell, 229 US 353, 358-362, 57 L ed 1224, 1226-1228, 33 S Ct 846; Allen v. Arguimbau, 198 US 149, 154, 155, 49 L ed 990, 993, 25 S Ct 622; Johnson v. Risk, 137 US 300, 307, 34 L ed 683, 686, 11 S Ct 111; Klinger v. Missouri (US), 13 Wall 257, 263, 20 L ed 635, 637."

The decision of the Supreme Court of Florida denying the petitioner's current petition for writ of habeas

corpus might have been, and probably was, based upon one or both of the following adequate state grounds:

(A) Under the Florida statute and the decisions of the Supreme Court of Florida the federal claims made in said petition were res judicata because of the denial of previous petitions for habeas corpus raising the same questions.

(B) The petitioner having previously sought habeas corpus, his current petition comes under the rulings of the Supreme Court of Florida that a convicted prisoner will not be heard to raise in a subsequent proceeding, whatever its nature, issues that the prisoner had had a fair and adequate opportunity to raise and have determined in earlier proceedings.

*AS TO THE CLAIM OF DOUBLE JEOPARDY OR DOUBLE PUNISHMENT.*

The Supreme Court of Florida takes judicial notice of its records (*Irvin v. Chapman, 75 So. 2d 591, 592; Baker v. State, 150 Fla. 446, 7 So. 2d 792*) and those records, which are in the record now before this Court, show that the petitioner's federal claim as to double jeopardy or double punishment had previously been adjudicated in a habeas corpus proceeding brought by the petitioner.

And under the Florida statute and the holdings of the Supreme Court of Florida, decisions in habeas corpus cases are res judicata (*Section 79.10, Florida Statutes*, formerly Section 5443, Compiled General Laws; *D'Alessandro v. Tippins, 102 Fla. 10, 137 So. 231; State ex rel. Davis v. Hardie, 108 Fla. 133, 146 So. 97; State ex rel. Williams v. Prescott, 110 Fla. 261, 148 So. 533;* and *Moat v. Mayo, 82 So. 2d 591*).

The petitioner's claim is, and he made the same claim in his 1952 petition, that he could not lawfully be required to serve more than 5 years under the sentences imposed in each case, or a total of 10 years. In his said 1952 petition to the Circuit Court of the Eighth Judicial Circuit of Florida in and for Union County, he alleged that the time he had already served, plus the gain time earned, was greater than the time required to serve a 10-year sentence, and he distinctly raised the federal question of whether the United States Constitution entitled him to escape serving more than 5 years under the sentences in each case. (R. 38-40.) The respondent's return admitted that the petitioner had served enough time and earned enough gain time to make a 10-year sentence. (R. 44.)

In said 1952 petition it was alleged (R. 40):

> "*Therefore, petitioner* would show unto the Court that he *is detained and imprisoned by the respondent herein,* against his will and *in direct violation of his rights as set out in the Constitution of the United States,* and the Constitution of the State of Florida, and contrary to the laws of the state of Florida." (Emphasis supplied.)

This allegation, coupled with the other allegations claiming double jeopardy or double punishment, was sufficient to properly present a federal question to the Circuit Court, that is to say, the question of whether the petitioner was imprisoned in violation of the due process clause of the 14th Amendment to the Constitution of the United States.

We concede that, as stated in *Wolfson & Kurland, Jurisdiction of the Supreme Court of the United States, 149 et seq.* (cited with approval by this Court in *Braniff Airways v. Nebraska State Board, 347 U.S. 590, 599*):

"Considerable confusion exists in the decisions of the Supreme Court with respect to the definiteness and particularity required to raise a federal question.

* * *

"Many of the holdings of the Supreme Court, because of the two lines of doctrine, are inconsistent."

However, we submit that the modern decisions of this Court sustain the sufficiency of said 1952 petition for habeas corpus to raise the federal question here presented as to double jeopardy or double punishment.

As far back as *Oxley Stave Company v. Butler County, 166 U.S. 648, 657,* this Court recognized that there is no rigid rule requiring a litigant to put his finger on the particular section or the precise words of the constitution upon which he relies. We quote from the opinion in that case as follows:

"If there has been any modification of the views expressed in the two cases just cited, it has been only in the particular that it is not always necessary to refer to the precise words or to the particular section of the Constitution, under which some right, title, privilege or immunity is claimed, and that it is sufficient if it appears affirmatively from the record that a right, title, privilege or immunity is specially set up or claimed under that instrument or under the authority of the United States."

And in the recent case of *Braniff Airways v. Nebraska State Board, supra,* reliance was placed upon the Commerce Clause and there was no specific claim of protection under the due process clause of the 14th Amendment. Nevertheless, this Court treated as sufficiently presented the federal question of whether the due process clause had been violated. We quote from this Court's opinion in that case (*347 U.S., text 598, 599*):

"*In relying upon the Commerce Clause on this issue and in not specifically claiming protection under the Due Process Clause of the Fourteenth Amendment, appellant names the wrong constitutional clause to support its position.* While the question of whether a commodity en route to market is sufficiently settled in a state for purpose of subjection to a property tax has been determined by this Court as a Commerce Clause question, the bare question whether an instrumentality of commerce has tax situs in a state for the purpose of subjection to a property tax is one of due process. *However, appellant timely raised and preserved its contention that its property was not taxable because such property had attained no taxable situs in Nebraska. Though inexplicit, we consider the due process issue within the clear intendment of such contention and hold such issue sufficiently presented.* See New York ex rel. Bryant v. Zimmerman, 278 US 63, 67, 73 L ed 184, 187, 49 S Ct 61, 62 ALR 785, and cases cited; Wolfson & Kurland, Jurisdiction of the Supreme Court of the United States, 149 et seq." (Emphasis supplied.)

Also, in the recent case of *Gibbs v. Burke, 337 U. S. 773* (decided in 1948, long before the petitioner in the case at bar filed his 1952 petition for habeas corpus), the petition for habeas corpus alleged that the petitioner "was denied his constitutional Rights as set forth in the Ten Original Amendments, Article VI." Nevertheless, on writ of certiorari to the Supreme Court of Pennsylvania, this Court reversed a judgment denying a writ of habeas corpus and held that the petition was sufficient to raise the question of whether the 14th Amendment had been violated. This Court said (text 779):

"The federal question was adequately if inartistically raised in the petition for a writ of habeas corpus. We consider insignificant under these circumstances the fact that petitioner cited the Sixth rather

than the Fourteenth Amendment to the Constitution. Meticulous insistence upon regularity in procedural allegations is foreign to the purpose of habeas corpus."

We grant that in *Gibbs v. Burke* the petitioner was apparently not represented by counsel when he filed his habeas corpus petition and that in the case at bar the petitioner was represented by counsel when he filed his 1952 petition. However, that should not prevent the rule of *Gibbs v. Burke* from applying to the instant case because, as was said by this Court in *Gibbs v. Burke*, in holding that a federal due process question was raised even though the petition mentioned neither due process nor the 14th Amendment nor the U. S. Constitution:

"Meticulous insistence upon regularity in procedural allegations is foreign to the purpose of habeas corpus."

Although in the 1952 petition for habeas corpus the petitioner alleged in general terms that he was imprisoned in direct violation of his rights as set out in the Constitution of the United States, it is clear now, and it must have been clear to the Circuit Court and to the Supreme Court of Florida, that the only provision of the United States Constitution which could even have been thought by anyone to be applicable to the allegations of fact set forth in said petition was the 14th Amendment. Therefore the clear intendment of said petition was that the petitioner was raising a federal question under the 14th Amendment and we submit that said 1952 petition sufficiently raised the same federal due process question as to double jeopardy which is presented by the current petition now under consideration.

Therefore, a writ of habeas corpus having been issued

as prayed in said 1952 petition, and said writ having been quashed and the petitioner remanded to custody at a hearing held by the Circuit Court, and the Supreme Court of Florida having dismissed the petitioner's appeal from the Circuit Court's ruling, the said ruling is res judicata as to said federal question under the above cited Florida statute and Florida decisions.

But even if the federal question now asserted had not been sufficiently raised in said 1952 habeas corpus proceedings, there is another adequate state ground to sustain the Supreme Court of Florida's denial of the petition here under consideration, that is to say, the federal claim raised by the current petition as to double jeopardy or double punishment was waived and could not be heard because of the fact that, as said Court judicially knew from its own records, the petitioner had had a fair and adequate opportunity to raise and have such question determined in the earlier 1952 habeas corpus proceedings in which he was represented by counsel.

In *State ex rel. Johnson v. Mayo, 69 So. 2d 307, 309*, the Supreme Court of Florida said:

> "In the petition for the writ of habeas corpus the petitioner has not made any attempt to give a reason for his failure to raise in prior proceedings the grounds now asserted for the first time in his petition for habeas corpus. Therefore, it must be held, under the decisions, that he has waived or forfeited the right to raise the issue by his failure to make timely assertion thereof."

Even if this Court should hold that the federal question as to double jeopardy or double punishment was not adequately presented by the 1952 petition for habeas corpus, it is to be noted that in the current petition the petitioner made no attempt to give a reason for his failure

to raise such federal question in the 1952 proceeding. Indeed, he could hardly have given a sufficient reason because he was represented by counsel in 1952, he knew all of the pertinent facts in 1952 which he knew in 1955, and he pled substantially the same facts in both petitions. Consequently, if this Court should hold that the 1952 petition did not adequately raise the federal question, then the rule of state procedure laid down in the foregoing quotation from *State ex rel. Johnson v. Mayo* was an adequate state ground to sustain the judgment of the Supreme Court of Florida in the case at bar.

And in *Washington v. Mayo*, 77 So. 2d 620, 621, the Supreme Court of Florida said:

> "The rule is clear that a *convicted prisoner should not be heard to raise in a subsequent proceeding, whatever its nature, issues* that were previously raised and determined, or *that the prisoner had a fair and adequate opportunity to raise and have determined in earlier proceedings.*" (Emphasis supplied.)

and we point out that it is clear that the petitioner had a fair and adequate opportunity to raise and have said federal question determined in said 1952 proceeding, since he was represented by counsel throughout that proceeding and then knew all pertinent facts which he knew when he filed the current petition in 1955.

The petitioner contends that the decision below did not rest upon the defense of res judicata because that defense was not affirmatively pleaded by the respondent. He cites *Rule 1.8, Florida Rules of Civil Procedure, 30 F. S. A., 1954 Supplement, page 64*, as authority for his claim that it is necessary to plead res judicata. It is only necessary to refer to *Rule "A," Florida Rules of*

*Civil Procedure*, found on *page 53* of the same *Supplement*, to see that said *Rule 1.8* has no reference to cases in the Supreme Court of Florida, whose order denied the current petition. The petitioner cites *Taylor v. Chapman, 127 Fla. 401, 173 So. 143, 144*; in support of his claim, but the ruling there had to do with a circuit court habeas corpus case and is not applicable to habeas corpus cases instituted in the Supreme Court of Florida, which, as above noted, takes judicial notice of its own records, and which frequently denies petitions for habeas corpus because those records show that the claims made by said petitions are res judicata and/or because its records show that the petitioners have had a fair and adequate opportunity to raise and have determined in prior proceedings the questions presented.

In an effort to show that the Supreme Court of Florida did not rely upon the doctrine of res judicata, the petitioner cites *Universal Const. Co. v. City of Fort Lauderdale (Fla.), 68 So. 2d 366, 369*, to the effect that the courts are more interested in the fair and proper administration of justice than in rigidly applying a fiction of the law designed to terminate litigation. Whatever may have been said in that case does not detract from the fact that the Supreme Court of Florida frequently does apply the doctrine of res judicata in habeas corpus cases, as witness the above cited decisions of the Supreme Court of Florida so applying said doctrine, dating both before and after the 1953 decision in *Universal Const. Co. v. City of Ft. Lauderdale*.

The fact also remains that in *State ex rel. Johnson v. Mayo, supra*, (decided in 1954, after the 1953 decision in the case relied on by the petitioner), the Supreme Court of Florida held that where a petition for a writ of habeas corpus did not make any attempt to give a

reason for not having raised the grounds for the petition in prior proceedings, the petitioner waives the right to raise the issue by his failure to make timely assertion thereof; and that in *Washington v. Mayo, supra,* (also decided after the case relied upon by the petitioner), the Supreme Court of Florida said that a convicted prisoner should not be heard to raise in a subsequent proceeding, whatever its nature, issues that the prisoner had had a fair and adequate opportunity to raise and have determined in earlier proceedings.

The petitioner contends that the order of the Supreme Court of Florida shows on its face that that Court considered the current petition on its merits and necessarily ruled on the federal claims asserted therein. Not so at all. The contention is based upon the fact that said Court's order denying the current petition recited that "it appears that the Petitioner has failed to show as a condition precedent to the writ of Habeas Corpus, probable cause to believe that he is detained in Custody without lawful authority" (R. 20). This recital by no means excludes the idea that the order was predicated upon one of the adequate state grounds hereinabove discussed.

Bearing in mind that the Supreme Court of Florida takes judicial notice of its own records and judicially knew all about the 1952 habeas corpus proceedings, the said recital does not exclude one or both of the above mentioned adequate state grounds from being the basis for the ruling in the case at bar. If the ruling was based upon the doctrine of res judicata, made to appear from the 1952 proceedings, then it was literally and figuratively true that the petitioner had failed to show as a condition precedent to the writ, probable cause to believe that he was detained in custody without lawful authority.

This is so because, with the bar of res judicata being judicially known to the Court, the petitioner failed, as a matter of state law, to show that he was being detained without lawful authority. If, on the other hand, the Supreme Court of Florida believed that he had not presented his said federal ground in the 1952 habeas corpus proceeding clearly enough to cause the ruling in that proceeding to be res judicata under Florida law, said Court still judicially knew that he was not being illegally detained because the said federal claim was no longer cognizable under Florida law on account of the fact that, being represented by counsel in the 1952 proceeding, he had had a fair and adequate opportunity to raise the claim in that proceeding and made no effort to give a satisfactory reason for not having done so.

The order now under review is in the standard form used by the Supreme Court of Florida in all habeas corpus actions for a good many years, and said form has uniformly been used when denying habeas corpus petitions regardless of what reasons were advanced by the respondents before said Court for denying the petitions. In other words, said form of order has consistently been used for years in cases where the respondents contended that the petitions were insufficient on their face to show an unlawful detention, and when the respondents contended that the petitioners' claims were barred by the state doctrine of res judicata because of previous habeas corpus proceedings in said Supreme Court, and when the respondents contended that the petitions should be denied because the petitioners had had a fair and adequate opportunity to present their claims in former proceedings, whether habeas corpus or not, judicially known to said Supreme Court.

Since the general terms of the said order do not show

the ground or grounds upon which it was based, and since its terms do not exclude the possibility that it was based upon one of the adequate state grounds urged by the respondent herein, it might be, and probably is, a fact that the order was predicated upon one or both of said state grounds.

*AS TO THE CLAIM THAT THE PETITIONER'S CONVICTION WAS BASED UPON PERJURED TESTIMONY.*

On May 9, 1949, the petitioner filed in the Supreme Court of Florida a petition for writ of habeas corpus in which he alleged (R. 33):

> "Petitioner alleges that he is innocent of said offense and is falsely imprisoned by reason that *verdict of guilt was wholly supported by prejudge and perjured testimony.*"

The said petition did not mention the Constitution of the United States or any provision thereof. Nor did the petition in *Gibbs v. Burke, supra,* mention the Constitution of the United States or the 14th Amendment and, even if the allegations of Gibbs' petition should be thought to impliedly refer to the Constitution of the United States, the provisions thereof upon which he relied were inapplicable to his situation. As was the case with Gibbs, the petitioner here was not represented by counsel when he filed his 1949 petition. Therefore, we submit that the said 1949 petition was just as sufficient to raise a federal due process question as was the petition in *Gibbs v. Burke.*

Moreover, the said 1949 petition was as adequate to raise a federal question as were the pleadings in *Braniff Airways v. Nebraska State Board, supra,* because in the

latter case reference was made to the wrong provision of the United States Constitution.

The result is that under the above cited authorities the denial of the 1949 petition was res judicata under Florida law and the Supreme Court of Florida might have denied, and probably did deny, the current petition because of res judicata judicially known to said Court.

However, even if the Supreme Court of Florida had deemed said 1949 petition insufficient to raise a federal question, the fact remains that the said court judicially knew that the petitioner, represented by counsel, had had a fair and adequate opportunity to raise his federal question about perjured testimony in his said 1952 petition but did not do so and did not even mention perjured testimony. Said Court also knew that his current petition did not undertake to give any reason for not having raised his present federal question as to perjured testimony in said 1952 proceedings; indeed, it is hard to see how he could have given a good reason because he was represented by counsel in 1952. The result is that, even if said Court deemed the state doctrine of res judicata inapplicable, the petitioner was not entitled to be heard under the decisions of said Court in *State ex rel. Johnson v. Mayo, supra,* and *Washington v. Mayo, supra,* on the claim in his current petition that his federal constitutional rights were violated by the use of perjured testimony at his trial. This was another adequate state ground upon which the decision of the Supreme Court of Florida might have been and probably was based.

## TWO

THE STATE OF FLORIDA HAS NOT CONVICTED AND PUNISHED THE PETITIONER MORE THAN

ONE TIME FOR A SINGLE OFFENSE AND THE SENTENCES IMPOSED BY THE STATE COURT HAVE NOT VIOLATED HIS RIGHTS AND IMMUNITIES UNDER THE DUE PROCESS CLAUSE OF THE 14TH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

The allegations of the petition for habeas corpus as to double jeopardy or double punishment cannot be accepted as true because those allegations conflict with the records of the trial court, which were before the Supreme Court of Florida at the time it made its ruling in the case at bar.

In Case No. 4179, the petitioner was adjudged guilty *"of the offense charged in each count of the information,"* and was sentenced to serve five years *"for your said offense charged in the first count,"* five years *"for your said offense charged in the second count,"* and five years *"for your said offense charged in the third count,"* with said sentences to run consecutively. (R. 13-14.)

In Case No. 4172, the petitioner was adjudged *"guilty of the crime of stealing cattle as charged in each count of the information in this case,"* and was sentenced to serve five years *"for your said offense charged in the first count,"* five years *"for the offense charged in the second count,"* and five years *"for the offense charged in the third count,"* with said sentences to run consecutively to each other and consecutively to the sentences in Case No. 4179 (R. 12-13).

It thus appears from the records of the sentencing court, which were before the Supreme Court of Florida, that the sentencing court adjudged the petitioner guilty of six separate larcenies and sentenced him for six separate larcenies, because in each of the two cases the

court adjudged the appellant guilty of *the CRIME CHARGED IN EACH COUNT;* and in each case the court sentenced the appellant for (1) *THE OFFENSE CHARGED IN THE FIRST COUNT,* (2) *THE OFFENSE CHARGED IN THE SECOND COUNT,* and (3) *THE OFFENSE CHARGED IN THE THIRD COUNT.*

And we point out that court records impart absolute verity as to all matters covered by them, and that they cannot be collaterally impeached in habeas corpus proceedings.

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It is permissible, under proper circumstances, to charge in separate counts of one information four distinct crimes of receiving stolen goods *(Stovall v. State, 156 Fla. 832, 24 So. 2d 582).* The logic and reasoning behind the decision in the Stovall case applies with equal force to a larceny case and permits, under proper circumstances, the charging of several distinct larcenies in different counts of the same information.

By adjudging the petitioner in the case at bar to be guilty of six separate larcenies, and by sentencing him for each of six separate larcenies, the trial court held that there actually were six separate larcenies and that the circumstances were such as to make it permissible to charge three of them in one information and the other three in a second information.

The fact that the information in case 4179 showed that all of the larcenies therein charged were committed on the same date and from the same cattle owner, and that the same situation obtained in case 4172 does not overcome the trial court's adjudication that there were six separate larcenies, since the Supreme Court of Florida has ruled " . . . that where property is stolen from

the same owner . . . at different times or places or as a result of a series of acts, separated in either time, place or circumstances, one from the other, each taking is a separate and distinct offense has been established as the law of this state since the case of Green v. State, 134 Fla. 216, 183 So. 728" *(Hearn v. State, 55 So. 2d 559)*, and it is undoubtedly possible for several larcenies to be committed from the same property owner at different times and places, and under different circumstances during the same day.

It thus appears that as a matter of fact and law, established by the trial court's judgments and sentences, there has been no double jeopardy or double punishment for the same offense, and that therefore the Supreme Court of Florida was justified in rejecting the petitioner's contention on this score.

And even if the record did not refute the petitioner's contention that he has been punished more than one time for the same offense, it appears that in *Holiday v. Johnston, 313 U. S. 342, 349*, this Court specifically ruled that "The erroneous imposition of two sentences for a single offense of which the accused has been convicted, or as to which he has pleaded guilty, does not constitute double jeopardy," and we point out that in that case the question was as to whether the imposition of two sentences for a single offense offended the 5th Amendment's double jeopardy clause and that, since this Court ruled that it did not so offend, it follows that two sentences imposed by a state court for a single offense certainly do not constitute double jeopardy in violation of the 14th Amendment.

The petitioner contends that the sentences totaling 30 years which were imposed upon him constitute cruel

and unusual punishment of the type forbidden by the 8th Amendment and that the due process clause of the 14th Amendment applies the 8th Amendment's cruel and unusual punishment clause to state action. In *Louisiana v. Resweber, 329 U. S. 459, 464,* this Court said that "The cruelty against which the Constitution protects a convicted man is cruelty inherent in the method of punishment, * * * ." There is no cruelty in the method of punishing the petitioner; he is merely confined in the state prison to serve his sentences just as any other prisoner sentenced to confinement in that institution. Moreover, the duration of the petitioner's sentences does not cause them to be cruel and unusual; it cannot rightly be said that a 5-year sentence for each of 6 separate acts of larceny of cattle is so cruel and unusual as to be within the meaning of the 8th Amendment's provision against cruel and unusual punishment. Said sentences are certainly not greater than has before been prescribed, known and inflicted as punishment. Moreover, so far as we have been able to ascertain, this Court has never held that violation of the principles of the 8th Amendment against cruel and unusual punishment violates the due process clause of the 14th Amendment. The nearest thing to a ruling on the question which we find is *Louisiana v. Resweber, supra,* where this Court examined the circumstances under the assumption, but without so deciding, that such cruel and unusual punishment would violate the due process clause of the 14th Amendment.

The petitioner contends that the equal protection of the laws clause of the 14th Amendment has been violated and that by violating said equal protection of the laws clause the Florida courts have violated the due process clause. In the first place, as we have hereinabove pointed out, the records show that there were six sep-

arate offenses and the result is that the petitioner has not received a different and higher punishment than is imposable and imposed on others for like offenses. Even if this were not so, the equal protection of the laws clause sits on its own bottom and is not sucked into and absorbed by the due process clause as a part thereof, regardless of what the facts might be. Also, we submit that the cases cited by the petitioner in support of his claim in this regard do not support the claim.

## THREE

THE DUE PROCESS CLAUSE OF THE 14TH AMENDMENT DOES NOT REQUIRE THAT A STATE FURNISH A REMEDY TO AN ACCUSED WHO HAS BEEN CONVICTED ON THE BASIS OF PERJURED TESTIMONY, WHERE THERE IS NO HINT THAT THE STATE OR ANYONE IN ITS BEHALF INSTIGATED, HAD ANYTHING TO DO WITH OR KNEW ANYTHING ABOUT THE PERJURY.

The due process clause of the 14th Amendment provides:

> "nor shall any *state* deprive any person of life, liberty or property, without due process of law." (Emphasis supplied.)

In *Virginia v. Rives, 100 U. S. 313, 317-318*, this Court, after quoting, inter alia, the due process clause of the 14th Amendment, said:

> "The provisions of the Fourteenth Amendment of the Constitution we have quoted all have reference to State action exclusively, and not to any action of private individuals."

In the *Civil Rights Cases, 109 U. S. 3, 10-11*, this Court,

after quoting the first section of the 14th Amendment, which includes the due process clause, said:

> "It is State action of a particular character that is prohibited. Individual invasion of individual rights is not the subject matter of the amendment."

There is no claim in this case that the state, through any official or agent or representative, knowingly used perjured testimony at the trial of the petitioner. Therefore, when the foregoing principles of law, which are undoubtedly sound, are applied to the case at bar, the inexorable result is that the petitioner has asserted nothing which, if true, would indicate a violation of the due process clause of the 14th Amendment. If there was perjury it was the act of individual witnesses and not the act of the State of Florida. No action is state action which is not instigated, encouraged or put into motion by the state or its functionary. Here the only action alleged by the petitioner was the action of two individual state witnesses in giving perjured testimony against the petitioner, with no allegation as to any state action whatsoever.

Certain cases decided by this Court (for example, *Mooney v. Holohan, 294 U. S. 103*) have held that where the state through one of its officials knowingly uses perjured testimony which results in the conviction of a defendant in a state court, such knowing use of perjured testimony violates the accused's federal constitutional rights. The basis of these decisions is that the perjury is state action because knowingly used by a state official or agent. We have found no case decided by this Court which even intimated that anything short of the knowing use of perjured testimony by the state would amount to a violation of the due process clause of the 14th Amendment.

However, we do find that in *Hysler v. Florida, 315 U. S. 411, 413*, where Hysler claimed that his conviction should be set aside because obtained upon the perjured testimony of two state witnesses one of whom had signed a recanting affidavit, this Court said:

> "In this collateral attack upon the judgment of conviction, the petitioner bases his claim on the recantation of one of the witnesses against him. *He cannot, of course, contend that mere recantation of testimony is in itself ground for invoking the Due Process Clause* against a conviction. However, if Florida through her responsible officials *knowingly* used false testimony which was extorted from a witness 'by violence and torture,' one convicted may claim the protection of the Due Process Clause against a conviction based upon such testimony." (Emphasis supplied.)

and we point out that the petitioner in the case at bar has not even attempted to go further than to claim that two state witnesses had recanted after giving perjured testimony against him.

Where state officers make an unlawful search and seizure, the evidence obtained thereby is admissible in the federal courts when not participated or cooperated in by federal officials or agents. *(Weeks v. U. S., 232 U. S. 383; Annotations, 134 A. L. R. 827; 150 A. L. R. 576.)* In such situations the United States Government is permitted to enjoy the fruits of the unlawful search and seizure by putting the state officers on the stand and having them testify to what they found and seized and by putting in evidence the articles seized. The reason this is legally possible is that the acts of the state officers are not federal action. How, then, can it rightly be thought that the acts of witnesses for the state in committing perjury all unbeknownst to the judge, the

prosecuting attorney, the jurors and all the other state functionaries amounts to state action? It can't, we submit.

We deduce from the petitioner's statement of Question 3 that he thinks that the "state's *continued* imprisonment" of the petitioner violates the due process clause even if his original convictions by the unwitting use of perjured testimony did not violate due process. Such a theory is untenable because, since the original convictions cannot be struck down as violative of the due process clause, those convictions and the sentences which followed furnish an unassailable basis for the continued imprisonment of the petitioner.

Moreover, even if the due process clause of the 14th Amendment prohibited a conviction where a state witness perjured himself without the knowledge of the state or any of its officers (we submit that it doesn't), the petitioner's claim that he was convicted solely upon the basis of perjured testimony is so insubstantial and inconclusive as to justify its rejection without a hearing on the merits thereof.

Here only one of the principal witnesses against the petitioner, R. B. Massey, Jr., has ever shown a willingness to put his name on the dotted line in support of his repudiation of his trial testimony. He did that in March, 1946, approximately 10 years ago (R. 16-17). There is not the slightest showing in the petition for writ of habeas corpus as to whether Massey is at this late time willing to back up his 1946 affidavit by getting on the witness stand and testifying to the same effect. For that matter, for all that the petition shows, Massey may be dead or otherwise completely unavailable to give testimony even if it were to be assumed that otherwise he would now be willing to do so.

As to the witness Charlie Bath, it does not appear that he has ever made a recanting affidavit or written statement of any kind. The most that the petition shows as to him is that in May, 1947, nearly nine years ago, one J. E. Croft made an affidavit to the effect that in January, 1946, Bath had orally made recanting statements to Croft (R. 17-18). But that does not mean that he would now testify to the same effect even if he should be alive and available as a witness, as to which the petition for writ of habeas corpus is silent. Actually there is grave doubt that Bath would give recanting testimony because according to Croft's said affidavit Bath stated back in 1946 that "if there was any way that he could help Durley, *without hurting himself* he would be glad to do so" (R. 18) and we observe that Bath could hardly help Durley without making himself out to be a perjurer and gravely hurting himself.

As to L. L. Bembry's affidavit, (R. 15) it established nothing of value to the petitioner. The most that it showed in his favor was that on Saturday, July 7, 1945 (the day the cattle involved in one case were alleged by the information to have been stolen) the petitioner worked with Bembry until noon. That falls far short of even tending to establish the petitioner's innocence of the theft of the cattle which were stolen on that day. For all that it shows, the cattle could easily have been stolen in the early morning hours of that day before work time or during the afternoon or night of that day. Nor does Bembry's affidavit make any showing whatever as to July 29, 1945, the day the cattle involved in the other case were alleged to have been stolen.

For all that is shown by the petitioner, he has had the above mentioned affidavits in his possession and available to him ever since they were made long years ago

and it is certain that he has had them available to him since 1949 when he attached copies thereof to the petition for writ of habeas corpus which he filed in the Supreme Court of Florida (R. 33-37).

So it is that such evidence of perjury as the petitioner has is far from being newly discovered evidence and is so insubstantial and inconclusive as to wholly fail to show that the petitioner's convictions were based on perjured testimony. This is especially true when it is considered that there was an utter failure to show that Charlie Bath (upon whose testimony the petitioner's convictions rested in part) has ever signed a recanting document or has ever been willing or is now willing and able to take the stand and repudiate under oath his prior testimony, and when it is considered that the evidence presented by the petitioner does not undermine the entire structure of the cases upon which the prosecutions were based.

## CONCLUSION

The writ of certiorari should be quashed for lack of jurisdiction and, if the merits be considered, the judgment of the Supreme Court of Florida should be affirmed.

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